92-533

Supreme Court, U.S.
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No. 92-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NICOLE ADAMS, a Minor Child, By and Through Her Next Friend, BETTY RIDGELL, and BETTY RIDGELL, as Representative of the Estate of JULIA ALICE ADAMS,

Petitioners,

v.

THE CHILDREN'S MERCY HOSPITAL, SUZANNA ROUSHAR, R.N., CYNTHIA DOOLEY, R.N., and JANE JELINEK-BOOZALIS, M.D.,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of Missouri

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PETITION FOR WRIT OF CERTIORARI

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September 25, 1992

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QUESTIONS PRESENTED

1. Is the Due Process Clause of the Fourteenth Amendment violated by a State statute which arbitrarily "caps" noneconomic damages recoverable in medical malpractice actions without providing the injured party any *quid pro quo* or "reasonably just substitute" for the common law tort remedy displaced?

2. Is the Equal Protection Clause of the Fourteenth Amendment violated by a State statute which discriminates between plaintiffs in medical malpractice actions and plaintiffs in all other common law tort actions or discriminates within the class of medical malpractice plaintiffs by denying recovery to medical malpractice plaintiffs with proven noneconomic damages in excess of a statutory "cap?"

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Supreme Court of Missouri are as stated in the caption of the case with the exception of the substitution of Betty Ridgell for Julia Alice Adams. Julia Alice Adams, the mother of the minor child and Plaintiff in her own right, died on May 19, 1992. Pursuant to Missouri procedure, timely Suggestions of Death and Motion for Substitution were filed with the Missouri Court of Appeals, Western District. The Motion For Substitution was sustained by that Court on August 4, 1992.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Nicole Adams and Betty Ridgell respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Missouri in this case.

OPINION BELOW

The opinion of the Supreme Court of Missouri, en banc, and the Court's Order denying rehearing are reported at 832 S.W.2d 898 (Mo. 1992), and are reprinted at Appendix A (App. 1a).

JURISDICTION

The decision of the Supreme Court of Missouri was filed on May 19, 1992. A timely motion for rehearing was denied on June 30, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. XIV, § 1:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mo. Rev. Stat. § 538.210.1:

> 1. In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, no plaintiff shall recover more than three hundred fifty thousand dollars per occurrence for noneconomic damages from any one defendant as defendant is defined in subsection 2 of this section.

Mo. Rev. Stat. § 538.210.1 (1986) (Limitation on Noneconomic Damages). "Noneconomic damages" under the statute are defined as:

> [D]amages arising from nonpecuniary harm including, without limitation, pain, suffering, mental an-

> guish, inconvenience, physical impairment, disfigurement, loss of capacity to enjoy life, and loss of consortium but shall not include punitive damages; . . .

Mo. Rev. Stat. § 538.205(7) (1986) (Definitions). The Missouri Medical Malpractice Act, Chapter 538, is set out in its entirety at Appendix E (App. 28a).

SECTION 2403(b) NOTIFICATION

Pursuant to Rule 29.4(c) of the Rules of the United States Supreme Court, Petitioners recite that 28 U.S.C. § 2403(b) may be applicable because the constitutionality of a statute of the State of Missouri is drawn into question and the State of Missouri is not a party.

STATEMENT OF THE CASE

This is a medical malpractice cause of action brought under the law of the State of Missouri. Nicole Adams, eight (8) years old and in excellent health, suffered massive, permanent injuries as a result of negligent medical care she received at The Children's Mercy Hospital in Kansas City, Missouri.

On March 25, 1988, Nicole's mother, Julia Alice Adams, took her to the hospital for treatment of a minor burn she received when Nicole accidently overturned a skillet of frying hamburgers splattering hot grease onto her shoulder. Doctors at the hospital recommended that she undergo a routine, non-emergency skin surgery to speed the healing of this burn.

During this surgery on March 30, 1988, a resident anesthesia physician at the hospital injected a grossly excessive and inappropriate amount of fluid into Nicole's body. The massive fluid overload caused Nicole to suffer a complete cardiac and respiratory arrest such that oxygen flow to her brain was interrupted for a minimum of six (6) minutes, destroying substantial portions of Nicole's brain. She was revived, but as a result of this negligent medical care, Nicole suffers extensive, irreversible brain damage, total blindness, and severe neurological disabilities.

Nicole's life expectancy remains normal and her doctors expect her to survive to over seventy (70) years of age in her present condition. She is unable to dress herself or care for her most basic needs, and requires constant supervision. Whereas before the malpractice Nicole was an exceptionally bright and gifted child, having scored in the top two percent (2%) for reading on her most recent Iowa Basic Test Scores, she now suffers permanent mental retardation.

On February 28, 1991, a state court jury returned its verdict in favor of Plaintiffs Nicole Adams and Julia Alice Adams awarding a total of $20,753,733.00 in compensatory damages:

For Nicole Adams:	
Past Economic Damages	$ 141,379.00
Future Economic Damages	$ 760,042.00
Future Medical Damages	$ 4,947,311.00
Past Non-Economic Damages	$ 3,905,000.00
Future Non-Economic Damages	$10,000,000.00
Total Damages	$19,750,732.00
For Julia Alice Adams:	
Past Non-Economic Damages	$ 250,000.00
Future Non-Economic Damages	$ —0—
Total Damages	$ 250,000.00

(Verdict A, App. B, at 21a-22a).

Pursuant to Mo. Rev. Stat. § 538.210.1, the trial court "capped" Petitioners' noneconomic damages at $430,000.00 multiplied by two (2), the number of separately insured defendants (App. C, at 24a).[1] Application of the "cap-

[1] The statutory "cap" originally was set at $350,000.00 per separately insured defendant. Mo. Rev. Stat. § 538.210(1) (1986). It is adjusted annually in accordance with the implicit price deflator for personal consumption expenditures as published by the Bureau of Economic Analysis of the United States Department of Commerce. § 538.210(4). At the time of trial, the "cap" was $430,000.00. A "defendant" is defined for purposes of applying the

ping" statute reduced Nicole Adams' noneconomic damages from $13,905,000.00 to $860,000.00, a decrease of $13,045,000.00. Pursuant to the Missouri statute, the trial court entered judgment for $3,082,518.16 (App. C, at 25a).[2]

The federal constitutional questions of Fourteenth Amendment Due Process and Equal Protection sought to be reviewed by this Court were raised at every stage of the proceedings below, both in the court of first instance and in the appellate courts. At the trial level, Petitioners raised these federal constitutional questions both before and subsequent to trial.

Petitioners raised these federal constitutional questions in their Motion to Bar the Enforcement of Any and All Provisions of V.A.M.S. Chapter 538 (Tort Actions Based On Improper Health Care) as Unconstitutional Under the United States and Missouri Constitutions filed prior to trial. Petitioners specifically contended therein that "Chapter 538 and its specific provisions denies Plaintiffs Equal Protection and Due Process of Law under the United States Constitution," expressly citing the Fourteenth Amendment to the United States Constitution. The trial court overruled Petitioners' motion.

Subsequent to trial, Petitioners raised these same federal questions at the trial court level in Plaintiffs' Motion to Modify Judgment of Trial Court or, Alternatively, Motion for New Trial and the trial court overruled that motion. Petitioners raised these federal questions again before the Supreme Court of Missouri. The Supreme Court of Missouri decided these federal constitutional questions adverse to Petitioners.

The federal constitutional questions sought to be reviewed by this Court were timely and properly raised at

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"cap" as all health care providers who are insured under the same professional liability insurance policy. § 538.210.2.

[2] Because defendants opted to assess fault to released parties pursuant to Mo. Rev. Stat. § 538.230. prior settlements totalling $5,505,779.00 were not applicable to the entry of judgment.

every stage of the proceeding so as to accord this Court jurisdiction to review the judgment on Petitioners' Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The sole issue presented here is the constitutionality under the Fourteenth Amendment of a State statute "capping" compensatory, noneconomic damages in all medical malpractice actions. While a number of other statutory provisions were challenged below, Petitioners limit their request for review in this Court to the statutory "capping" issue.[3] This case provides this Court an opportunity to resolve an important constitutional issue dividing the federal and state courts below.

I. A CLEAR AND SUBSTANTIAL SPLIT OF AUTHORITY EXISTS AMONG THE STATE AND FEDERAL COURTS ON THE CONSTITUTIONALITY OF STATUTORY "CAPS" ON NONECONOMIC DAMAGES IN MEDICAL MALPRACTICE CASES UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT AND THIS ISSUE IS ONE OF RECURRING NATIONAL SIGNIFICANCE

The two federal constitutional questions presented by this Petition previously have come to this Court. *Fein v. Permanente Medical Group*, 474 U.S. 892 (1985). In dissenting from the dismissal of the appeal, Justice White noted the unsettled federal Equal Protection question

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[3] Punitive or exemplary damages comprise no aspect of this case. Punitive damages were not sought or alleged at trial and, moreover, "noneconomic damages" under the Missouri Medical Malpractice Act expressly exclude punitive damages. Mo. Rev. Stat. § 538.205(7) (App. E, at 29a).

The other provisions of the Missouri Medical Malpractice Act which were challenged below but are not raised here were § 538.230 (right of medical malpractice defendant to apportion fault to released parties), § 538.230.2 (modification of joint and several liability in favor of medical malpractice defendants), § 538.220 (right of medical malpractice defendants to pay judgments in periodic or installment payments), and § 538.300 (special exception for medical

raised by statutory limits on noneconomic damages in medical malpractice actions. *Id.* at 893. Justice White further pointed out that the Due Process issue raised by damages limits had not been resolved by this Court:

> Whether due process requires a legislatively enacted compensation scheme to be a *quid pro quo* for the common-law or state-law remedy it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several States.

474 U.S. at 894-95 (emphasis in original). This split has widened in the seven years since *Fein*.

A clear and substantial split of authority has developed among the state and federal courts as to the constitutionality of statutory "caps" on damages in medical malpractice actions under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[4] For example, in

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malpractice judgment debtors immunizing them from "prejudgment interest" rule). *See* App. E. at 32a, *et seq.*

[4] Cases upholding statutory damages "caps" on Fourteenth Amendment Due Process or Equal Protection grounds: *Boyd v. Bulala*, 877 F.2d 1191, 1197 (4th Cir. 1989) (State of Virginia's statutory cap on total recovery of damages in medical malpractice actions of $750,000.00 "does not violate the fourteenth amendment's guarantees of due process or equal protection"); *Davis v. Omitowoju*, 883 F.2d 1155, 1158-59 (3d Cir. 1989) (Virgin Islands statute capping medical malpractice verdicts at $250,000.00 for noneconomic damages does not violate Due Process or Equal Protection under Fourteenth Amendment); *Lucas v. United States*, 807 F.2d 414, 421-22 (5th Cir. 1986) (held that Texas statute limiting "nonmedical damages" to $500,000.00 is constitutional under Federal Equal Protection and Due Process, but certified issue to Texas Supreme Court which held statute unconstitutional under Texas Constitution); *Hoffman v. United States*, 767 F.2d 1431, 1437 (9th Cir. 1985) (California statute limiting recovery for noneconomic loss to $250,000.00 in medical malpractice suits "does not violate the Equal Protection Clause of the Federal Constitution"); *Franklin v. Mazda Motor Corp.*, 704 F.Supp. 1325, 1337 (D.Md. 1989) (upholding Maryland statute imposing limitations on noneconomic damages in all personal injury cases rejecting Due Process argument under Fourteenth Amendment); *Etheridge v. Medical Center Hospitals*,

the case at bar, the Supreme Court of Missouri expressly held that the Missouri "capping" statute did not violate

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376 S.E.2d 525, 533-34 (Va. 1989) (limiting total recoverable damages in a medical malpractice action to $750,000.00 does not violate Equal Protection Clause of Fourteenth Amendment to U.S. Constitution); *Fein v. Permanente Medical Group*, 695 P.2d 665, 682-83 (Cal. 1985) ("we know of no principle of California—or federal—constitutional law which prohibits the Legislature from limiting the recovery of damages in a particular setting in order to further a legitimate state interest" finding no federal Due Process or Equal Protection violation), *appeal dismissed*, 474 U.S. 892 (1985); *Sibley v. Board of Supervisors of Louisiana State University*, 462 So.2d 149, 158, *opinion modified*, 477 So.2d 1094, 1109-10 (La. 1985) (original decision upheld constitutionality of $500,000.00 limitation on recovery in medical malpractice cases under Equal Protection and Due Process Clauses of Federal Constitution, modified opinion remands case to trial court to receive evidence and argument on constitutionality of statute under Louisiana Constitution); *Johnson v. St. Vincent Hospital, Inc.*, 404 N.E.2d 585, 598-600 (Ind. 1980) ($500,000.00 limits on malpractice recovery do not offend Due Process or Equal Protection Clauses of Fourteenth Amendment); *Prendergast v. Nelson*, 256 N.W.2d 657, 668 (Neb. 1977) (three-justice plurality agreed that $500,000.00 limit on medical malpractice recovery is "consistent with the dictates of the . . . federal Constitution").

Cases invalidating statutory damages "caps" on Fourteenth Amendment Due Process or Equal Protection grounds: *Waggoner v. Gibson*, 647 F.Supp. 1102, 1106 (N.D. Tex. 1986) (Texas Act imposing recovery limitations of $500,000.00 on medical malpractice victims unconstitutional because it violates Equal Protection Clause of Federal Constitution); *Arneson v. Olson*, 270 N.W.2d 125, 135-36 (N.D. 1978) (statute limiting recovery in medical malpractice cases to $300,000.00 violates Equal Protection provision of Fourteenth Amendment to United States Constitution); *Carson v. Maurer*, 424 A.2d 825, 830-31 (N.H. 1980) (limits on malpractice damages violate Equal Protection guarantee of U.S. Constitution, Fourteenth Amendment); *Smith v. Department of Insurance*, 507 So.2d 1080, 1087-88 (Fla. 1987) ($450,000.00 cap on noneconomic damages violates Equal Protection Clause of United States Constitution and Florida's constitutional right of access to courts using federal *quid pro quo* analysis); *Jones v. State Board of Medicine*, 555 P.2d 399, 404-06 (Idaho 1976) (standards applicable to Equal Protection and Due Process challenges under Fourteenth Amendment as developed by United States Supreme Court require higher scrutiny of statutory limits in medical malpractice actions, remanding to district court

the Equal Protection Clause of the Fourteenth Amendment:

> The Adamses' claim that the challenged provisions of Chapter 538 deny them equal protection of the laws as required by the Fourteenth Amendment of the United States Constitution . . . We hold that the

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for factual determination which resulted in damages ceiling being held unconstitutional), *cert. denied*, 431 U.S. 914 (1977), *on remand*, Case Nos. 55527 and 55586 (4th Dist. Idaho, Nov. 3, 1980); *Pfost v. State*, 713 P.2d 495, 501 (Mont. 1985) (statutory "cap" on damages for tort action against State or political subdivision thereof held unconstitutional under Equal Protection provision of State Constitution using "criteria developed in federal cases" adding that result reached under Equal Protection Clause of Fourteenth Amendment of Federal Constitution would be no different), *ovrld on other grnds, Meech v. Millhaven West, Inc.*, 776 P.2d 488 (Mont. 1989); *Duren v. Suburban Community Hospital*, 482 N.E.2d 1358, 1362-63 (Ohio C.P. 1985) (statutory limitation on medical malpractice recovery "violates the protection of . . . Federal Constitution" referring to both Due Process and Equal Protection); *Detar Hospital, Inc. v. Estrada*, 694 S.W.2d 359, 365-66 (Tex.App. 1985) (statutory "cap" in malpractice action violates Equal Protection Clause of federal Constitution); *Baptist Hospital of Southwest Texas, Inc. v. Baber*, 672 S.W.2d 296, 298 (Tex.App. 1984) (violative of federal Equal Protection); *Simon v. St. Elizabeth Medical Center*, 355 N.E.2d 903, 912 (Ohio C.P. 1976) (statutory limitation of $200,000.00 for general damages recoverable in medical malpractice actions violates "Fourteenth Amendment of the Federal Constitution with respect to Equal Protection under the law"); *Graley v. Satayathem*, 343 N.E.2d 832, 838-39 (Ohio C.P. 1976) (provisions of Ohio Malpractice Act violative of United States Constitution, Fourteenth Amendment).

See also McGuire v. C & L Restaurant, Inc., 346 N.W.2d 605, 609, 613 n.10 (Minn. 1984) (damages "cap" of $250,000.00 in Minnesota Dram Shop Act violates Fourteenth Amendment Equal Protection guarantee of United States Constitution); *Condemarin v. University Hospital*, 775 P.2d 348, 363-64 (Utah 1989) (damages cap for medical malpractice as against governmental health care providers violative of Due Process utilizing federal constitutional analysis); *Hoffman v. United States, supra*, at 1433 & n.1 (reversing federal district court's holding that California statute placing "caps" on non-economic damages in malpractice actions "is unconstitutional in that it violates equal protection," although district court did not specify whether holding was based on U.S. or State Constitution, or both).

> provisions of Chapter 538 do not violate equal protection.

832 S.W.2d at 903, 905 (App. A, at 7a, 12a). This finding is in sharp and direct contrast to the decisions of other state and federal courts which have invalidated damages restrictions on Fourteenth Amendment Equal Protection grounds:

> . . . Limitation on recovery in malpractice cases is a violation of the equal-protection provision . . . of the Fourteenth Amendment to the United States Constitution.

Arneson v. Olson, 270 N.W.2d 125, 136 (N.D. 1978).[5]

In his dissent in *Fein v. Permanente Medical Group*, *supra*, Justice White noted that as of that date:

> Four other States which have addressed similar damages limitations have invalidated the challenged provision on federal constitutional grounds.

474 U.S. at 893 (citing to State court decisions from Texas, New Hampshire, North Dakota, and Ohio).[6] In

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[5] *See* note 4 *supra* (cases invalidating statutory damages "caps" under Equal Protection Clause of Fourteenth Amendment).

[6] State court decisions are presumed by this Court to rest on Federal law where the State court opinion makes use of both Federal and State cases in its analysis and the opinion lacks the "plain statement" that it rests on independent and adequate state grounds. *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) (citing *Michigan v. Long*, 463 U.S. 1032, 1040-41 [1983]); *see also New York v. Class*, 475 U.S. 106, 109-10 (1986). Several state court decisions overturning "capping" statutes have not clearly indicated whether they were relying on Federal or State constitutional grounds, or both. *See, e.g., Carson v. Maurer*, 424 A.2d at 836-38 and *Baptist Hospital of Southeast Texas v. Baber*, 672 S.W.2d at 298, both of which were cited by Justice White in his *Fein* dissent as State cases which invalidated statutory damage limits "on federal constitutional grounds." 474 U.S. at 893.

Of course, for those state court decisions upholding statutory damage limitations, no independent or adequate state constitutional ground could support the judgment if a federal constitutional right is found to have been denied. *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931); *Union Pacific R. Co. v. Public Service Commission*

that nearly all of the decisions on this constitutional issue have addressed similar statutory limits on noneconomic damages in medical malpractice cases, the federal constitutional conflict is clear, unavoidable, and irreconcilable.[7]

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of Missouri, 248 U.S. 67, 70 (1918). *See also Michigan v. Long*, *supra*, at 1068 (Stevens, J., dissenting) ("in reviewing the decisions of State courts, the primary role of this Court is to make sure that persons who seek to vindicate federal rights have been fairly heard").

Even those State court decisions resting on State constitutional provisions squarely have relied upon and invoked cognate federal Due Process and Equal Protection guarantees established by this Court. *See, e.g., Morris v. Savoy*, 576 N.E.2d 765, 770-71 (Ohio 1991) ($200,000.00 cap on general damages in medical malpractice actions violates Due Process provision of Ohio Constitution following federal analysis); *Robinson v. Charleston Area Medical Center, Inc.*, 414 S.E.2d 877, 882 n.5, 888 (W.Va. 1991) (upholding statutory limits on noneconomic damages under West Virginia Constitution's Equal Protection and Due Process provisions invoking Federal Constitution, Fourteenth Amendment and decisions of this Court); *Samsel v. Wheeler Transport Services, Inc.*, 789 P.2d 541, 555-56 (Kan. 1990) (invoking federal *quid pro quo* analysis); *Lucas v. United States*, 757 S.W.2d 687, 691-92 (Tex. 1988) (limitation of $500,000.00 on recovery against health care providers violates "open courts" provision of Texas Constitution incorporating federal *quid pro quo* analysis); *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251, 257-59 (Kan. 1988) (statutory damage limits in medical malpractice cases violate Kansas constitutional right to a remedy by due course of law invoking U.S. Constitution and federal Due Process analysis, and violate State constitutional right to trial by jury); *Wright v. Central DuPage Hospital Association*, 342 N.E.2d 736, 742-43 (Ill. 1987) (federal *quid pro quo* analysis).

[7] The divisiveness of this issue is further borne out by the fact that in three (3) of the States where no "Patient Compensation Fund" was created, *see* note 21 *infra*, the constitutionality of the "capping" statute was upheld by the narrowest of margins. *Etheridge v. Medical Center Hospital* (Va.), *supra* (4-3 decision); *Fein v. Permanente Medical Group* (Cal.), *supra* (4-3 decision); *Prendergast v. Nelson* (Neb.), *supra* (plurality decision in which only three of seven justices upheld capping provision as constitutional).

In two of the four U.S. Court of Appeals' decisions, the highest court of the State enacting the statute previously had upheld the damages restriction and this factor was given great weight by each

Justice White predicted that:

> Moreover, given the continued national concern over the "malpractice crisis," it is likely that more States will enact similar types of limitations, and that the issue will recur.

474 U.S. at 894. That prescient passage foresaw the reality of the continued enactment of State legislation limiting the compensation of medical malpractice victims. This issue is one of recurring national significance in that twenty-four (24) States have enacted statutory limits on damages recoverable in medical malpractice actions.[8]

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court. *Hoffman v. United States* (9th Cir.), *supra*, at 1433-34, 1433 n.2 (California statute); *Boyd v. Bulala* (4th Cir.), *supra*, at 1194 (Virginia statute).

[8] Of the twenty-four state statutes, eighteen deal solely with limitations on recoverable damages in medical malpractice actions, and six apply to all personal injury tort actions. *Alabama*—Ala. Code § 6-5-544(b) (1987) (recovery for noneconomic loss in medical malpractice action shall not exceed $400,000.00); *Alaska*—Alaska Stat. § 09.17.010 (Supp. 1988) (limiting recoverable noneconomic damages in personal injury actions to $500,000.00); *California*—Cal. Civ. Code § 3333.2 (Supp. 1989) (in medical malpractice actions limiting noneconomic damages recovery to $250,000.00); *Colorado*—Colo. Rev. Stat. § 13-21-102.5(3)(a) (1987) (limiting noneconomic damages awards in civil actions to $250,000.00 unless the court finds justification by clear and convincing evidence, an absolute cap of $500,000.00); *Florida*—Fla. Stat. § 86-160 (1986) ($450,000.00 limitation on noneconomic damages applicable to all civil actions); *Idaho*—Idaho Code, Title 39, Chapter 42 (1975) (ceiling on recoverable damages in medical malpractice cases of $150,000.00 per claim and $300,000.00 per occurrence or amount of $10,000.00 multiplied by total number of beds in hospital); *Illinois*—Ill. Rev. Stat. Ch. 70 (1975) (maximum recovery in medical malpractice cases set at $500,000.00); *Indiana*—Ind. Code Ann. § 16-9.5-2-2 (Burns Supp. 1989) (limiting total amount recoverable in a medical malpractice action to a maximum of $750,000.00 and providing for a patient compensation fund); *Kansas*—Kan. Stat. Ann. § 60-3407 (1986) which limited recoverable noneconomic damages in medical malpractice actions to $250,000.00 and total recovery to $1,000,000.00 was struck down by the Kansas Supreme Court in *Kansas Malpractice Victims Coalition v. Bell*, 257 P.2d 251, 269 (Kan. 1988); however, Kan. Stat. Ann. § 60-19(A)-01 (1987) limiting noneconomic damages to $250,000.00 in all personal injury actions

This issue affects many lives. Based upon the population of those States in which "capping" legislation has

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except medical malpractice was upheld by the Kansas Supreme Court in *Samsel v. Wheeler Trans. Serv., Inc.*, 789 P.2d 541 (Kan. 1990); *Louisiana*—La. Rev. Stat. Ann. § 40:1299.39(B) (limiting total amount recoverable in medical malpractice action to $500,000.00, later amended to apply to noneconomic damages only); *Maryland*—Md. Cts. & Jud. Proc. Code Ann. § 11-108 (Supp. 1987) (limiting recovery for noneconomic damages to $350,000.00); *Massachusetts*—Mass. Gen. Laws Ann. ch. 231, § 60H (Supp. 1989) (limiting noneconomic damages in medical malpractice actions to $500,000.00 unless the jury finds special circumstances); *Michigan*—Mich. Comp. Laws Ann. § 600.1483 (Supp. 1989) (limiting noneconomic damages in medical malpractice cases to $225,000.00 except in specified circumstances); *Minnesota*—Minn. Stat. Ann. § 549.23 (Supp. 1988) (limiting intangible losses, excluding pain, disability, or disfigurement, to $400,000.00 in all civil actions); *Missouri*—Mo. Rev. Stat. § 538.210 (1986) (in medical malpractice actions, limiting recovery for noneconomic damages to $350,000.00); *Nebraska*—Neb. Rev. Stat. § 44.2825 (1988) (limiting recovery for all damages in medical malpractice cases to a maximum of $1,000,000.00 from the health care provider and a statutory liability fund); *New Hampshire*—N.H. Rev. Stat. Ann. Chapter 507-C (Supp. 1979) (limits awards in medical malpractice actions to $250,000.00 for noneconomic loss); *North Dakota*—N.D. Cent. Code, Chapter 26-40.1 (1977) (limits liability of health care provider to $300,000.00 per occurrence); *Ohio*—Ohio Rev. Code Ann. § 2307.43 (setting $200,000.00 cap on general damages in medical malpractice lawsuits); *Texas*—Tex. Rev. Civ. Stat. Ann., Art. 4590i (1986) (established "cap" of $500,000.00 on recovery of damages by plaintiffs in medical malpractice suits); *Utah*—Utah Code Ann. § 78-14-7.1 (Supp. 1986) (limiting recovery against health care providers for noneconomic damages to $250,000.00); *Virginia*—Va. Code § 8.01-581.15 (1976) (limiting total amount recoverable in action against health care provider to $750,000.00); *Washington*—Wash. Rev. Code Ann. Ch. 4.56.250 (1986) (application of formula limits noneconomic damages using average annual wage and life expectancy); *West Virginia*—W.Va. Code § 55-7B-8 (1987) ($1 million "cap" for noneconomic loss in medical professional liability action against health care provider).

To date eleven of the twenty-four State statutes have been declared unconstitutional by the highest court of that State. Five State supreme courts have invalidated "capping" statutes on Fourteenth Amendment Due Process or Equal Protection grounds. *See* note 4 *supra*. Four State supreme courts have overturned the

been unchallenged or upheld, more than thirty percent (30%) of the entire U.S. population is currently subject to some form of "caps" on damages, primarily in malpractice actions.[9] The question of whether statutory "caps" on damages are permissible under the federal Constitution has now percolated sufficiently in the state and federal courts below rendering it ripe for decision in this Court.[10] The passage of time or further litigation in

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statutes on State equal protection, due process, or "open courts" provisions using federal constitutional analysis. *See* note 6 *supra*. Two others have invalidated damages limits on State constitutional right to jury trial grounds. *Moore v. Mobile Infirmary Association*, 592 So.2d 156, 171 (Ala. 1991) (statute limiting damages for noneconomic loss to $400,000.00 in medical malpractice cases violates Alabama Constitution's right to trial by jury); *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 712-13 (Wash. 1989) (cap on noneconomic damages violates right to trial by jury of Washington Constitution).

[9] 1990 Census of Population and Housing, U.S. Department of Commerce, Bureau of the Census (March 1992).

[10] Legal commentary upon this issue has been extensive. *See, e.g.*, Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 Tex. L. Rev. 759 (1977); Note, *Medical Malpractice Damage Caps: Navigating the Safe Harbors*, 65 Wash. U.L.Q. 565 (1987); Note, *Constitutional Law—Tort Reform—Judicial Responses to Damage Cap Legislation and Their Potential Influence on the Alabama Tort Reform Package*, 18 Cumb. L. Rev. 759 (1988); Comment, *Caps, "Crisis," and Constitutionality—Evaluating The 1986 Kansas Medical Malpractice Legislation*, 35 Kan. L. Rev. 763 (1987); Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 Okla. L. Rev. 196 (1985); Harpter, *Which Equal Protection Standard for Medical Malpractice Legislation?*, 8 Hastings Const. L.Q. 125 (1980); Hirsh, *Medical Crisis of the 80's Part III—Professional Liability Tort Reform, Legal Aspects of Medical Practice*, December 1985; Seiden, *The Malpractice Muddle*, Commonweal, January 17, 1986, at 8; *Medical Malpractice: Will Jumbo Awards Spark Another Insurance Crisis?*, 68 ABA J. 1545 (1982); Blaut, *The Medical Malpractice Crisis—Its Causes and Future*, 44 Ins. Counsel J. 114 (1977); Aitken, *Medical Malpractice: The Alleged "Crisis" in Perspective*, 637 Ins. L.J. 90 (1976); Witherspoon, *Constitutionality of the Texas Statute Limiting Liability for Medical Malpractice*, 10 Tex. Tech. L. Rev. 419 (1979); White & McKenna, *Constitutionality of Recent Malpractice Legislation*, 13 Forum 312 (1977); Reidinger, *The Doctor Is In: Courts Limit*

the lower federal courts or in the state courts cannot resolve or clarify this federal constitutional issue. The facts and circumstances of this case render it an ideal vehicle for this Court's resolution of an extremely important and worthy constitutional question.

Malpractice Liability, ABA J. (November 1989) at 112; Abraham, *Medical Malpractice Reform: A Preliminary Analysis*, 36 Md. L. Rev. 489 (1977); Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 Duke L.J. 1417; Comment, *Recent Medical Malpractice Legislation—A First Checkup*, 50 Tul. L. Rev. 655 (1976); Comment, *Alternatives to the Medical Malpractice Phenomenon: Damage Limitations, Malpractice Review Panels and Counter-suits*, 34 Wash. & Lee L. Rev. 1179 (1977); Comment, *Statutes Limiting Medical Malpractice Damages*, 32 Fed'n Ins. Couns. Q. 247 (1982); Comment, *Medical Malpractice: A Sojourn Through the Jurisprudence Addressing Limitation of Liability*, 30 Loy. L. Rev. 119 (1984); Note, *Fein v. Permanente Medical Group: Future Trends and Damage Limitation Adjudication*, 80 Nw. U. L. Rev. 1643 (1987); Note, *The Constitutionality of Medical Malpractice Legislative Reform: A National Survey*, 18 Loy. U. Chi. L.J. 1053 (1987); Qual, *A Survey of Medical Malpractice Tort Reform*, 12 Wm. Mitchell L. Rev. 417 (1986); Note, *Legislative Limitations on Medical Malpractice Damages: The Chances of Survival*, 37 Mercer L. Rev. 1583, 1603 (1986); Note, *Statutory Caps on Damage Awards in Medical Malpractice Cases*, 13 Okla. City L. Rev. 135 (1988); Comment, *Medical Malpractice: Constitutional Implications of a Cap on Damages*, 7 N. Ill. U. L. Rev. 61 (1986); Note, *Medical Malpractice—$250,000 Cap on Pain and Suffering, Cal. Civ. Code § 33.2—Does The Statute Meet Its Constitutional Burden and Legislative Goals?*, 8 Whittier L. Rev. 601 (1986); Commentary, *Medical Malpractice: The Second Wave of "Reform,"* 37 Ala. L. Rev. 419 (1986); Martin, *Limiting Damages for Pain and Suffering*, 10 Am. J. Trial Adv. 317 (1986); Note, *A Tale of Three Damage Caps: Too Much, Too Little and Finally Just Right*, Case West. Res. L. Rev. 40:825 (1989-90).

II. THE MISSOURI SUPREME COURT HAS DECIDED SUBSTANTIAL AND IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

A. This Court's Fourteenth Amendment Due Process Decisions Provide Substantive Safeguards Applicable To The Arbitrary Limitation of Noneconomic Damages In Medical Malpractice Actions

The Missouri statute approved by the Supreme Court of Missouri eliminates the historic common law right of severely injured medical malpractice victims to recover noneconomic compensation over and above the statutory, pre-set "cap." No such damages "cap" exists for any other type of common law tort action. Missouri common law had long recognized the right of an injured person in a tort action to recover fair and just compensation for noneconomic damage—disability, pain and suffering, loss of enjoyment of life,[11] disfigurement—subject to judicial safeguards for excessive verdicts such as remittitur or new trial. *Porter v. Hannibal & St. J. R. Co.*, 71 Mo. 66, 81-82 (Mo. 1879); *Hyatt v. Hannibal & St. J. R. Co.*, 19 Mo.App. 287, 293 (Mo.App. 1885) ("Mental pain and suffering is recognized as an element of damage in nearly every state in the Union, and in none more clearly than in Missouri").[12]

Similarly, Missouri law has long provided for "full compensation" in a personal injury action in tort regardless of what the defendant can or should pay, *Craton v.*

[11] This Court recently confirmed that common law compensatory damages include "loss of enjoyment of life." *Molzof v. United States*, 112 S.Ct. 711, 717-18 (1992).

[12] *See also Schmitz v. St. Louis, I. M. & S. Ry. Co.*, 24 S.W. 472 (Mo. 1893), where the Supreme Court of Missouri held that when a boy nine (9) years of age was injured so as to render him a "cripple for life," it was proper to compensate him for mental suffering arising from his conscious knowledge of that fact. *Id.* at 477-78.

Huntzinger, 187 S.W. 48, 52-53 (Mo. 1916), and has followed the common law rule that compensatory damages must be based on facts specifically relating to the particular injuries. *Wilson v. Davis*, 280 S.W. 44, 45 (Mo. 1925), *cert. denied*, 273 U.S. 776 (1927).

As is clear by the Missouri statutory definitions of "economic" and "medical" damages under the Malpractice Act, Mo. Rev. Stat. § 538.205(1)(6), these only provide compensation for products and services specifically needed because of the injuries and to replace income lost because of the inability of the injured party to work due to these injuries. Economic loss alone does not and cannot fully compensate an injured person. When one has suffered an injury which will produce life-long quadriplegia, blindness, severe mental retardation, or loss of limb, it is the function of noneconomic damages to compensate a human being for that loss in society's best effort to make that person whole.[13]

1. *Due Process Requires A* Quid Pro Quo *Or "Reasonably Just Substitute" For The Displacement Of A Common Law Remedy*

This Court has pointed out that Fourteenth Amendment Due Process historically has protected a liberty interest in one's personal security:

> Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal liberty.

Ingraham v. Wright, 430 U.S. 651, 673 (1977) (citing to 1 W. Blackstone's Commentaries at 134 and to the 39th Article of the Magna Carta which provided that "an individual could not be deprived of this right of personal security 'except by the legal judgment of his peers or by the law of the land' ").[14]

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[13] "[F]or a child who has been paralyzed from the neck down, the only compensation for a lifetime without play comes from noneconomic damages." *Fein v. Permanente Medical Group*, 695 P.2d at 689-90 (Bird, C.J., dissenting).

[14] Justice Stevens has stated that Fourteenth Amendment liberty interests "are both physical and intellectual. Every violation of a

State abolition of a historic common law damages remedy implicates a protected Fourteenth Amendment interest.[15] Indeed, access to State courts by private citi-

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person's bodily integrity is an invasion of his or her liberty." *Washington v. Harper*, 494 U.S. 210, 237 (1990) (Stevens, J., concurring in part and dissenting in part).

[15] In discussing the requirements of Due Process under the Fourteenth Amendment, this Court concluded over a century ago that:

> It is the duty of every State to provide, in the administration of justice, for the redress of private wrongs; . . .

Missouri Pacific Railway Co. v. Humes, 115 U.S. 512, 521 (1885). *See also Truax v. Corrigan*, 257 U.S. 312 (1921), where this Court articulated the common law protections inherent in Fourteenth Amendment Due Process:

> The Due Process Clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.

Id. at 332 (citing *Hurtado v. California*, 110 U.S. 516, 535 [1884]).

This Court has emphasized that "[a] damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional rights . . ." *Owen v. City of Independence, Missouri*, 445 U.S. 622, 693 (1980). Full and just compensation for injuries dates back to the Magna Carta and was incorporated into Lord Coke's writings in the Second Institute of 1671. According to Lord Coke:

> Every Subject . . . for injury done to him in *bonis, terris, vel persona*, by any other Subject . . . may take his remedy by the Law, and have justice, and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay.

Coke, 2nd Institute, 55-56 (4th ed. 1671). In one of this Court's most famous decisions, Chief Justice Marshall emphasized the critical responsibility of government to afford a remedy when a right has been violated:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162-63 (1803).

zens for resolution of disputes governed by Fourteenth Amendment Due Process.[16] State legislatures are undoubtedly free to alter various substantive and procedural aspects of their tort system, and Petitioners do not advance any notion of "federal tort law;" but the statutory elimination of a compensatory damages remedy so fundamentally impacts upon the common law rights of private litigants as to raise powerful Federal Due Process concerns.[17]

This Court has strongly suggested that Due Process requires a *quid pro quo* or "reasonably just substitute" for the statutory displacement of a common law remedy for injury. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 92-93 (1978); *New York*

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[16] *Boddie v. Connecticut*, 401 U.S. 371, 380-81 (1971) (constitutional right of access to the courts applicable to the States through the Fourteenth Amendment). Due Process protection extends to plaintiffs affirmatively seeking access to the courts and they are entitled to at least as much Due Process as defendants who are compelled into court. *Id.* at 381.

This Court has justified the State's monopoly over the court system by imposing the constitutional requirement that the States "must function strictly within these bounds" of Due Process of law:

> Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.

Boddie, 401 U.S. at 375.

[17] *See United States v. Stanley*, 483 U.S. 669, 710 (1987) (O'Connor, J., concurring in part and dissenting in part):

> If this principle [of the Nuremberg Military Tribunals] is violated the very least that society can do is to see that the victims are compensated, as best as they can be, by the perpetrators. I am prepared to say that our Constitution's promise of due process of law guarantees this much.

Central R. Co. v. White, 243 U.S. 188, 201 (1917).[18] Despite these Due Process decisions of this Court, the State of Missouri has deprived the most severely injured medical malpractice plaintiffs of their historic common law right to full and fair compensation and has provided them nothing in return.

The genesis of *quid pro quo* constitutional analysis was this Court's 1917 decision in *New York Central R. Co. v. White*, *supra*. Therein, this Court reviewed the constitutionality of a state workers' compensation law and found that the benefits conferred by the statute created a "reasonably just substitute" for the common law remedies it displaced:

> Nor is it necessary, for the purposes of the present case, to say that a State might, without violence to the constitutional guarantee of "due process of law," suddenly set aside all common-law rules respecting liability between employer and employee without providing a reasonably just substitute . . . [I]t perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead.

243 U.S. at 201.

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[18] *See also PruneYard Shopping Center v. Robins*, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring) ("Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish 'core' common-law rights, . . ., at least without a compelling showing of necessity or a provision for a reasonable alternative remedy") (citing *Duke Power* and *New York Central R. Co.*).

See also Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U.S. 151, 158-59 (1931) (held that a State is free to choose among various forms of remedy "provided its choice is not unreasonable or arbitrary" and Due Process requirements of Fourteenth Amendment "are satisfied if the substitute remedy is substantial and efficient"); *Crane v. Hahlo*, 258 U.S. 142, 147 (1922) (legislature may alter or change a remedy "so long as a substantial and efficient remedy remains . . .") (citing *Oshkosh Waterworks Co. v. Oshkosh*, 187 U.S. 437, 439 [1903]).

This Court pointed out that the "statute under consideration sets aside one body of rules only to establish another system in its place." *Id.* at 201. This Court ruled that the New York Act must be "judged in its entirety" and proceeded with an extensive discussion as to whether the method of compensation provided by the Act was a substitute scheme which "transcends the limits of permissible state action." *Id.* Significantly, however, the amount of compensation statutorily provided was not raised and to this point this Court stated:

> This, of course, is not to say that any scale of compensation, however insignificant on the one hand or onerous on the other, would be supportable. . . . Any question of that kind may be met when it arises.

243 U.S. at 205-06. This precise question now arises before this Court given the "onerous" limitation on damages imposed by the Missouri "capping" statute and the Missouri Supreme Court's rejection of Petitioners' argument that the statute deprives them of due process of law under the Fourteenth Amendment.

More recently, this Court utilized this identical *quid pro quo* analysis in *Duke Power Co. v. Carolina Environmental Study Group, supra.* This Court evaluated the Price-Anderson Act which put a $560 million ceiling on liability in nuclear power plant accidents in exchange for the imposition of strict liability and an expedited recovery scheme. 438 U.S. at 69. This Court upheld the Act under Due Process challenge emphasizing the creation of a substitute compensation scheme created by Congress. *Id.* at 92-93. This Court found advantageous to plaintiffs the Act's "waiver of defenses" which effectively would entitle "injured parties to compensation without proof of fault . . ." *Id.* at 91.

This Court heavily stressed the non-arbitrariness of the particular $560 million "cap" arrived at by both expert appraisal of the risk of nuclear incident and the Congress' explicit commitment that the "caps" were a "starting point" and that additional relief would be assured. *Id.* at 86-87. In that regard, this Court concluded

that the particular damages ceiling provided for was within permissible Due Process limits. *Id.* at 87.

In addition to the arbitrary nature of the damages ceiling, the Petitioners contended that the Act failed "to provide those injured by a nuclear accident with a satisfactory *quid pro quo* for the common-law rights of recovery which the Act abrogates." *Id.* at 87-88. In view of the alternative compensation scheme provided for by the Act, this issue was not reached:

> However, we need not resolve this question here since the Price-Anderson Act does, in our view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces.

438 U.S. at 88. This Court also viewed favorably the Act's provision of "immediate assistance" payments and the elimination of expenses and time-consuming litigation on liability. *Id.* at 91-92. This Court found that the Act guaranteed a level of compensation "generally exceeding that recoverable in private litigation" and again stressed the "explicit Congressional commitment" to take additional action over and above the $560 million ceiling. *Id.* at 93. In language strongly suggesting the requirement of a *quid pro quo*, this Court concluded upon its review of the Price-Anderson Act:

> This panoply of remedies and guarantees is at the least a reasonably just substitute for the common-law rights replaced by the Price-Anderson Act. Nothing more is required by the Due Process Clause.

438 U.S. at 93.

Not a single one of the factors relied upon by this Court in upholding the constitutionality of the damages ceiling in *Duke Power* is present in the Missouri statutory scheme imposing mandatory "caps" on malpractice damages. Furthermore, this Court analyzed the constitutionality of the Act in view of Congress' overriding objective to encourage private development of nuclear reactors. 438 U.S. at 83-84. No correlative objective is remotely applicable respecting health care in that hospitals and physi-

cians have exceedingly high economic incentives to enter and remain in the health care field.[19]

The legislative schemes upheld by this Court in *New York Central R. Co.* and *Duke Power* as against Due Process attack were entirely different from the challenged Missouri statute in that specific and measurable benefits were conferred upon those persons whose common law remedies were severely restricted or abolished. No benefit whatsoever is bestowed upon malpractice victims such as Nicole Adams by the Missouri "capping" statute. The Missouri Medical Malpractice Act offers no waiver of defenses, expediency of resolution, or guaranteed compensation fund as per the Acts under review in *New York Central R. Co.* and *Duke Power*, but instead retains and even amplifies all of the pre-existing proof and liability burdens upon injured plaintiffs (App. E, at 28a). This Court never has upheld the statutory elimination of a damages remedy for a historic common law tort action without any measure of benefit in return.

As Justice White noted in his dissent in *Fein v. Permanente Medical Group*:

> One of the reasons for the division among the state courts is a question left unresolved by this Court in *Duke Power Co. v. Carolina Environmental Study Group, Inc.* . . .

474 U.S. at 894 (citation omitted). Many State supreme courts have utilized this Court's *quid pro quo* analysis as a basis for invalidating statutory damage "caps" in medical malpractice cases.[20] Use of a *quid pro quo* analysis

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[19] *See* Owens, Earnings Survey, *Medical Economics*, September 4, 1989, at 147.

[20] *Arneson v. Olson*, 270 N.W.2d at 134-35; *Lucas v. United States*, 757 S.W.2d at 690 ("our first concern with the statute is that the legislature has failed to provide Lucas any *adequate substitute* to obtain redress for his injuries"); *Carson v. Maurer*, 424 A.2d at 837-38; *Wright v. Central DuPage Hospital Assoc.*, 347 N.E.2d at 738-39 ("defendants argue that there is a societal *quid pro quo* in that the loss of recovery potential to some malpractice victims is offset by 'lower insurance premiums and lower

provided the justification for two (2) State supreme courts to uphold the constitutionality of their respective medical malpractice damages limitations statutes.[21]

In upholding damages "caps" in malpractice actions, many lower federal courts and state supreme courts have interpreted this Court's *Duke Power* decision as dismissing any constitutional Due Process objections to legislative limits on damage recoveries.[22] Nowhere did this

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medical care costs for all recipients of medical care.' This *quid pro quo* does not extend to the seriously injured medical malpractice victim . . ."); *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d at 260 ("when a common-law remedy is modified or abolished, an adequate substitute remedy must be provided to replace it"); *Condemarin v. University Hospital*, 775 P.2d at 361 ("determinative question is therefore whether the recovery cap can be regarded as a reasonable, nonarbitrary limitation on the right to recover for tortious injuries in a context where a common law right to recovery has been restricted"); *see generally* Learner, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties*, 18 Harv. J. Legis. 143, 180-83 (1981).

[21] *Johnson v. St. Vincent Hospital, Inc.*, 404 N.E.2d at 601; *Sibley v. Board of Supervisors of Louisiana State University*, 462 So.2d at 156. Both the Indiana and Louisiana schemes involved the creation of a Patient Compensation Fund and this was given great emphasis by each court in upholding the constitutionality of the statute. *Johnson v. St. Vincent Hospital, supra*, at 601 ("[t]he [Indiana] legislature responded by creating the Patient Compensation Fund"); *Sibley v. Board of Supervisors of Louisiana State University, supra*, at 156.

[22] *See, e.g., Hoffman v. United States* (9th Cir.), 767 F.2d at 1435-36 (citing *Duke Power* for proposition that Supreme Court has sustained tort liability limitation); *Boyd v. Bulala* (4th Cir.), 877 F.2d at 1197 n.6 (rejecting as "unsound" plaintiff's argument that damages caps implicate Due Process Clause because they abolish a common law remedy without providing a reasonably just substitute, citing *Duke Power* where "Supreme Court declined an opportunity to establish the *quid pro quo* requirement"); *Etheridge v. Medical Center Hospitals* (Va.), 376 S.E.2d at 532 (citing *Duke Power* for proposition that "legislature has the power to provide, modify, or repeal a remedy"); *Fein v. Permanente Medical Group* (Cal.), 695 P.2d at 682 (citing *Duke Power Co.* for proposition that no federal constitutional law prohibits the legislature from

Court sanction the use of damage limitations under Due Process without evaluating the total statutory replacement scheme, the remedies otherwise available, and the specific impact on the affected parties. *Duke Power*, 438 U.S. at 90-93; *New York Central R. Co. v. White*, 243 U.S. at 201-03. This Court could not have been any clearer that it was expressly reserving this issue for another day wherein it concluded that "we did not resolve this question" because the Act "provided a reasonably just substitute." *Duke Power*, 438 U.S. at 88.

It is appropriate and timely for this Court to take up this question specifically left unresolved fourteen (14) years ago in *Duke Power* and which germinated seventy-five (75) years ago in *New York Central*. Courts, legislatures, and litigants across the country urgently require this Court to clarify the role, if any, that *quid pro quo* analysis plays in federal Due Process.

2. *Statutory "Caps" On Noneconomic Damages Recoverable By Medical Malpractice Plaintiffs Are Arbitrary And Capricious In Violation Of Due Process*

This Court has long held that state legislation is violative of substantive Due Process where it is arbitrary, capricious or irrational. *Williamson v. Lee Optical Co. of Oklahoma, Inc.*, 348 U.S. 483, 488-89 (1955); *West Coast Hotel v. Parrish*, 300 U.S. 379, 400 (1937); *Mobile*,

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limiting the recovery of damages); *Franklin v. Mazda Motor Corp.* (D.Md.), 704 F.Supp. at 1331-32 (same); *Lucas v. United States* (5th Cir.), 807 F.2d at 422 (concluding that "dicta" in *Duke Power* "answers this case" such that "there is no Due Process violation in the application of this [damages capping] statute to plaintiffs such as Lucas under the federal Constitution"); *Jones v. State Board of Medicine* (Idaho), 555 P.2d at 409 ("idea that Due Process imposes a *quid pro quo* requirement seems to have resulted from dictum in *New York Central R. Co. v. White*, . . . however, it appears to have been nothing more than a make-weight argument"). *But see Waggoner v. Gibson* (N.D. Tex), 647 F.Supp. at 1106 ("Due Process may require that a legislatively enacted compensation scheme provide a reasonably substitute remedy for displacing a remedy at common law").

J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35, 43 (1910). In this instance, the State arbitrarily has chosen to impose the burdens of malpractice upon the most severely injured patients and to leave them without the measure of compensation as would be permitted in every other tort action. Any number of alternatives exist for the State to intervene to accomplish its purpose such as regulation and administration of insurance rates, enhanced education and quality control of health care providers, or regulation of health care expenses.

The arbitrariness of the Missouri statutory limitation on damages is readily apparent when the amount of compensation for noneconomic loss would depend to a far greater extent upon the number of malpractitioners[23] rather than upon the seriousness of the injury or whether the type of loss is one compensable in economic terms.[24] The effect of the "cap" is to act as a legislative pre-set involuntary remittitur. If a State may arbitrarily cap noneconomic recovery at some pre-set figure, there is no basis for denying it the capacity to cap recovery at any dollar figure or even to totally abolish that remedy altogether.

The automatic and inflexible nature of the statutory damages limitation fails to take into account any case specific evaluation or to provide for any exceptions or departures. The original $350,000.00 "cap" defies rational explanation in terms of the nature and extent, duration, and disabling feature of injuries suffered by

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[23] *See* note 1 *supra*. The damages "cap" is multiplied by the number of separately insured defendants. Mo. Rev. Stat. § 538.210.2 ("Defendant" defined).

[24] For example, an arm or leg may be replaced for many years, albeit incompletely, by expensive electronic prostheses. Yet medical technology has no comparable replacement for the severely brain-damaged person and, hence, the only compensatory measure of that loss would be in the form of noneconomic rather than economic recovery. It is the unique function of noneconomic loss to replace that which is irreplaceable and to restore in kind that which was taken away.

badly victimized malpractice plaintiffs, such as Petitioner Nicole Adams.

B. This Court's Fourteenth Amendment Equal Protection Decisions Require Invalidation Of A Statutory "Cap" On Noneconomic Damages Applicable Only To Medical Malpractice Plaintiffs Because the State's Discriminatory Treatment Of This Particular Class Of Common Law Tort Plaintiffs Cannot Survive Judicial Scrutiny

The Missouri statute "capping" recoveries to malpractice plaintiffs imposes grossly discriminatory treatment on one particular class of tort victims, those severely injured by negligent medical practitioners. The statute also creates a discriminatory sub-class of persons within the class of medical malpractice victims whose noneconomic damages are fairly and reasonably found by a jury after judicial review to be in excess of the statutory "cap." The State of Missouri has created a dramatic and arbitrary distinction in the quality of justice which victims of medical malpractice may receive compared with victims of any other actionable common law negligence, in sharp violation of numerous decisions of this Court forbidding States from denying to persons within their jurisdiction the equal protection of the laws.

This Court on occasion has applied an elevated form of scrutiny for justification of certain legislation. This Court carefully has scrutinized certain statutes applicable either to particular rights or classes, by evaluating whether a "substantial relationship" exists between the means and ends of the statutory classification scheme.[25]

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[25] *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 262-63 (1974) ("compelling state interest" and "heavy burden of justification" on durational residency requirement for non-emergency medical care); *Turner v. Dept. of Employment Security of Utah*, 423 U.S. 44, 45-46 (1975) (unemployment compensation); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (food stamps); *Trimble v. Gordon*, 430 U.S. 762, 767 (1977) (illegitimate children); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103-05 (1976) (aliens); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645-46

This Court never has considered the federal constitutional question of whether right of access to the courts to seek private redress for tortious bodily harm is a "fundamental" or "quasi-fundamental" right or whether severely injured medical malpractice plaintiffs comprise a "suspect" or "semi-suspect" class so as to trigger a greater level of scrutiny than mere rational relationship.

Many lower courts have utilized a more searching scrutiny of statutory restrictions on malpractice recoveries, concluding that the statute denied equal protection of the laws.[26] Many other courts, including the Supreme Court of Missouri in the case at bar, have declined to do so.[27] Whether a statutory limitation on damages appli-

(1975) (women); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (unwed fathers); *see also Lalli v. Lalli*, 439 U.S. 259, 269 (1978); *Craig v. Boren*, 429 U.S. 190, 240 (1976), *rehearing denied*, 429 U.S. 1124 (1977); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971).

[26] *Condemarin v. University Hospital*, 775 P.2d at 356 (applying "heightened standard of review under equal protection"); *Brannigan v. Usitalo*, 587 A.2d 1232, 1234 (N.H. 1991); *Arneson v. Olson*, 270 N.W.2d at 133-34; *Simon v. St. Elizabeth Medical Center*, 355 N.E.2d at 911-12; *Graley v. Satayathem*, 343 N.E.2d at 838-39; *Pfost v. State*, 713 P.2d at 501-02; *Jones v. State Board of Medicine*, 555 P.2d at 411-12. According to the Ohio court in *Graley v. Satayathem*, *supra*:

> There obviously is "no compelling governmental interest" unless it be argued that any segment of the public in financial distress be at least partly relieved of financial accountability for its negligence.

343 N.E.2d at 837. In noting that the right to recover for personal injuries was "an important substantive right," the Supreme Court of New Hampshire applied the "fair and substantial relationship" test in invalidating the medical malpractice statute under review:

> We now conclude, however, that the rights involved herein are sufficiently important to require that the restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test.

Carson v. Maurer, 424 A.2d at 830.

[27] The Missouri Supreme Court refused to apply any higher standard of scrutiny to the damages "cap" other than the rational relationship test which it agreed was "minimal in nature." 832 S.W.2d at 903 (App. A, at 8a). *See Hoffman v. United States*, 767 F.2d at 1436 ("Finding that [statutory cap] does not involve any suspect

cable to one particular type of common law tort action warrants higher scrutiny is a question deserving of attention by this Court.

Even without a more rigorous and searching scrutiny of the challenged statute on Equal Protection grounds, the rational relationship test is not toothless. This Court's holdings have many times confirmed that a State is not constitutionally permitted to create a classification of persons whose relationship to the asserted legislative goal is "so attenuated as to render the distinction arbitrary or irrational." *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982); *see also Plyler v. Doe*, 457 U.S. 202, 216 (1982); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 535 (1973).

The "rational relationship" test requires the court to assess whether any legitimate state interest is promoted by the classification scheme created by the statute. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 173 (1972). When reviewed in terms of the objectives sought, a number of courts have held that singling out the class of persons most catastrophically injured and disabled by health care providers for disparate treatment has no reasonable or legitimate relationship to the state interest of reducing malpractice insurance costs or increasing the availability of health care.[28]

Applying only the rational relationship test, these courts have determined that a legislative act which "caps" damages is an unconstitutional denial of Equal Protection.

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or quasi-suspect classification, a fundamental right, or a classification requiring a heightened scrutiny, we conclude that the proper level of scrutiny is the rational basis test"); *Prendergast v. Nelson*, 256 N.W.2d at 669; *Johnson v. St. Vincent Hospital, Inc.*, 404 N.E. 2d at 597; *Sibley v. Board of Supervisors of Louisiana State University*, 462 So.2d at 156-57.

[28] *Waggoner v. Gibson*, 647 F.Supp. at 1106 ("stricter standards of review are not appropriate" but invalidating statute under "rational relationship" test); *Baptist Hospital of Southeast Texas, Inc. v. Baber*, 672 S.W.2d at 298 (finding violation of Equal Protection using "rational basis test"); *Wright v. Central DuPage Hospital Association*, 347 N.E.2d at 741-42.

According to the reasoning of these courts, the fact that physicians and hospitals would have to pay higher premiums for liability coverage is not a legitimate basis to deny the full measure of compensation to the persons they injure.[29] They argue that the interest of the State in protecting the income of physicians is not a legitimate goal when to do so results in a measure which is not shared equally among consumers of health care, but to be borne entirely by those consumers who receive bad health care.[30]

No basis ever exists for compromising firmly entrenched constitutional protections.[31] This Court has firmly established that constitutional protections exist "in good and bad times." *Youngstown Sheet & Tube Co. v. Sawyer*, 343

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[29] *Waggoner v. Gibson*, 647 F.Supp. at 1106-07; *Duren v. Suburban Community Hospital*, 482 N.E.2d at 1362-63 ("Simply stated, the legislative scheme of shifting responsibility for loss from one of the most affluent segments of society to those who are most unable to sustain that burden, i.e., horribly injured or maimed individuals, is not only inconceivable, but shocking to this Court's conscience").

[30] *But see Boyd v. Bulala*, 877 F.2d at 1197 ("cap on liability bears a reasonable relation to a valid legislative purpose").

[31] A number of reports and studies have determined that the alleged malpractice "crisis" had no relationship whatsoever with the function of the tort system, and was attributable entirely to market conditions and mismanagement of risk and funds by the insurance carriers themselves. *See, e.g.*, Sepler, *Professional Malpractice Litigation Crises: Danger or Distortion?*, 15 Forum 493 (1980); Kindregin and Swartz, *The Assault on the Captive Consumer: Emasculating the Common Law of Torts in the Name of Reform*, 18 St. Mary's L.J. 673 (1987); Aitken, *Medical Malpractice: The Alleged "Crisis" In Perspective*, 637 Ins. L.J. 90, 96 (1976); Oster, *Medical Malpractice Insurance*, 45 Ins. Counsel J. 228, 231 (1978); General Accounting Office, *Medical Malpractice: A Framework for Action*, 32 (1987); Crane, *Does Your Malpractice Insurer Owe You A Refund?*, *Medical Economics*, October 16, 1989, at 60; Nader, *The Corporate Drive to Restrict Their Victims' Rights*, 22 Gonzaga L. Rev. 15 (1986); Schroater & Rutzick, *"Tort Reform": Being an Insurance Company Means Never Having to Say You're Sorry*, 22 Gonzaga L. Rev. 31 (1987); *The Manufactured Crisis: Liability Insurance Companies Have Created A Crisis and Dumped It On You*, Consumer Reports, Aug. 1986, at 544.

U.S. 579, 589 (1952).[32] The prevalence of medical negligence in this country and the various efforts to combat it assure that this issue of restricting compensation to the most badly injured victims will remain at the forefront of the national debate on health care.[33]

CONCLUSION

As Justice White stated in his *Fein* dissent seven years ago: "The issue is important, and is deserving of this Court's review." 474 U.S. at 895. The fully percolated conflict below and the recurring national significance of this issue now present a compelling case for review by this Court. Petitioners respectfully urge this Court to grant their Petition for Writ of Certiorari.

Respectfully submitted,

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September 25, 1992

[32] *See also Waggoner v. Gibson*, 647 F.Supp. at 1107 ("constitutional protections exist for litigants regardless of market conditions for insurance companies and the medical industry; concerns about the latter cannot be allowed to override the former at the expense of those who prove at trial that they were most seriously injured by acts of malpractice"); *Simon v. St. Elizabeth Medical Center*, 355 N.E.2d at 911-12 ("there is no crisis situation, short of civil insurrection, sufficient to deprive, water down or make less valuable the right to seek redress of grievances, . . .").

[33] A recent study of New York hospitals conducted by the Harvard School of Public Health concluded that an enormous percentage of meritorious malpractice claims are never brought by the victim or the victim's family. Harvard Medical Practice Study, *"Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York"* (February 1990), at p. 6 ("eight times as many patients suffered an injury from negligence as filed a malpractice claim in New York State").

APPENDICES

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APPENDIX A

SUPREME COURT OF MISSOURI
EN BANC

No. 73867

NICOLE ADAMS, a minor, by and through her legal guardian and next friend, JULIA ALICE ADAMS, and JULIA ALICE ADAMS, individually,

Appellants,

vs.

THE CHILDREN'S MERCY HOSPITAL, *et al.*,

Respondents.

APPEAL FROM THE CIRCUIT COURT
OF JACKSON COUNTY

Filed May 19, 1992

Rehearing Denied June 30, 1992

ROBERTSON, Chief Justice.

This appeal from a judgment in a medical malpractice suit challenges, among other things, the constitutionality of portions of this state's legislative response to increases in the cost of health care services resulting from a perceived medical malpractice insurance crisis. We have jurisdiction. Mo. Const. art. V, § 3. We conclude that the challenged provisions of Chapter 538, RSMo 1986, are constitutional.[1] The remaining issues are transferred

[1] All statutory references are to RSMo 1986 unless otherwise indicated.

to the Court of Appeals, Western District, for appellate review.

I.

Proper medical care has the power to restore, to turn a temporary tragedy into a triumph over disease and injury; negligently provided medical care has the power to destroy, to turn a temporary trauma into a permanent tragedy. In this case, medical negligence did not make whole; it ripped a life asunder; it turned the trauma of household burns into the tragedy of total dependence, of brain damage, of a severe and permanent handicap.

On March 25, 1988, Nicole Adams, a gifted eight-year-old, practiced in her family kitchen a singing and dancing routine for an upcoming recital. Julia Alice Adams, Nicole's mother, watched Nicole dance as she prepared the evening meal. The dance routine took Nicole near the stove. She struck the handles of two skillets, which overturned, dumping hot grease and frying hamburgers onto the right side of Nicole's body.

Mrs. Adams rushed Nicole to Children's Mercy Hospital (the Hospital). The Hospital admitted Nicole and scheduled her for skin graft surgery on March 30, 1988. That morning, Dr. Ronald Sharp performed the skin graft surgery. Anesthesia Associates of Kansas City, Inc. (Anesthesia Associates), which operated the Hospital's anesthesia department under contract with the Hospital, assigned Dr. Jane Jelinek-Boozalis (Dr. Jelinek), an anesthesia resident from the University of Kansas Medical Center, to the case. Dr. Robert Binda and Dr. Peter Mestad, both of Anesthesia Associates, supervised Dr. Jelinek.

During the operation Nicole received 7,000 cc's—7 liters —of crystalloid solution intravenously. Crystalloid is a saline solution of 99 percent water and 1 percent other dissolved substances. It is used to replace body fluid lost during surgery. A person of Nicole's weight (approxi-

mately 60 pounds) would normally receive no more than 2,350 cc's of crystalloid.

The introduction of such a massive amount of fluid caused Nicole's body to swell. In the recovery room, Dr. Mestad, who supervised Nicole's anesthesia recovery and who was aware of the amount of crystalloid Nicole had received during the procedure, removed the endotracheal tube from Nicole. This tube served to protect Nicole's airway. Once Dr. Mestad removed the tube, fluid-induced swelling closed Nicole's trachea. Respiratory and cardiac failure followed. No oxygen reached Nicole's brain for approximately six minutes.

Nicole is now cortically blind. She suffers motor disabilities which cause her to walk very clumsily and awkwardly. She can barely move her fingers in a coordinated manner or in any intended sequence. Her brain is significantly damaged; she now has epilepsy; she can no longer add two plus two. She will never be able to function independently or support herself by working.

The jury returned a verdict against the health care defendants and apportioned fault as follows:

Children's Mercy Hospital	**20%**
Nurse Rousher	**0%**
Nurse Dooley	**0%**
Dr. Jelinek	**18%**
Dr. Sharp	**2%**
Dr. Binda	**10%**
Dr. Mestad	**50%**
Dr. Powers	**0%**

The jury assessed the Adamses' total damages in excess of $20 million. That amount included over $13 million in "noneconomic" damages. The trial court reduced the judgment as directed by Section 538.210.

The Adamses and the Hospital filed motions for new trial and, when those were not successful, appealed. Dr. Jelinek failed to move for a new trial. She now seeks plain error review.

II.

On appeal, this Court decides only the constitutional questions raised in the Adamses' appeal. The Adamses contend that those portions of Section 538.210 limiting noneconomic damages; of Section 538.220 permitting payment of future damages in periodic or installment payments; and of Section 538.230.2 modifying joint and several liability violate a host of provisions of the Missouri Constitution: (1) the open courts provision, Mo. Const. art. I, § 14; (2) right to trial by jury, Mo. Const. art. I, § 22(a); (3) equal rights and opportunities, Mo. Const. art. I, § 2; (4) due process, Mo. Const. art. I, § 10; (5) special law, Mo. Const. art. III, § 40(28); (6) privileges and immunities, Mo. Const. art. I, § 13; (7) one subject requireemnt, Mo. Const. art. III, § 23; (8) separation of powers, Mo. Const. art. III, § 1; and (9) the constitutional directives for amending statutes, Mo. Const. art. III, § 28. In due course, we will consider plaintiffs' constitutional claims. First, however, it is necessary to lay out the factual background upon which plaintiffs found those claims.

A.

The jury returned its verdict in this case in favor of plaintiffs Nicole Adams and her mother, Julia Alice Adams, in the following amounts:

For Nicole Adams:

Past Economic Damages	$ 141,379.00
Future Economic Damages	$ 760,042.00
Future Medical Damages	$ 4,947,311.00
Past Non-Economic Damages	$ 3,905,000.00

Future Non-Economic Damages.....	$10,000.000.00
Total Damages	$19,750,732.00 [2]

For Julia Alice Adams:

Past Non-Economic Damages	$ 250,000.00
Future Non-Economic Damages.....	$ —0—
Total Damages	$ 250,000.00

But for the intervention of Chapter 538, plaintiffs claim that the judgment entry should be as follows:

VERDICT FOR NICOLE ADAMS	$19,750,732.00
Less: Present Value of Settlements Paid to Date	−4,500,000.00
	$15,250,732.00
Plus: Pre-and Post-Judgment Interest Pursuant to Section 408.040 (1/9/90 to 10/9/91)	+2,494,638.00
TOTAL JUDGMENT FOR NICOLE ADAMS (Not Including Court Costs)	$17,745,370.00
VERDICT FOR JULIA ALICE ADAMS	$ 250,000.00
Less: Present Value of Settlements	−1,005,779.00
TOTAL JUDGMENT FOR JULIA ALICE ADAMS	$ —0—

Applying Chapter 538 to the jury's verdict in this case, the trial court entered judgment as follows:

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[2] The numbers reported here are taken from the jury's findings in Verdict A. The jury incorrectly added Nicole Adams' Total Damages. The actual total of the itemized damages found by the jury is $19,753,732.00

VERDICT FOR NICOLE ADAMS:

Total Economic Damages	$ 5,848,732.00
Less: Medical Bills Paid by The Children's Mercy Hospital	−28,232.25
Less: Medical Bills Absorbed by The Children's Mercy Hospital	−114,184.52
Net Economic Damages	$ 5,706,315.00
TOTAL NON-ECONOMIC DAMAGES	$13,905,000.00
Total Economic Damages: ($5,848,732.00 × .38)[3]	$ 2,222,518.16
TOTAL NON-ECONOMIC DAMAGES: ($430,000.00 × 2 defendants)	$ 860,000.00
TOTAL JUDGMENT FOR NICOLE: (Not Including Court Costs)	$ 3,082,518.16

Section 538.210 provides:

> In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, no plaintiff shall recover more than three hundred fifty thousand dollars per occurrence for non-economic damages from any one defendant.[4]

Section 538.220 permits any party to a medical malpractice action to request, before entry of the judgment, that the court order that "future damages be paid in whole or in part in periodic or installment payments if the total award of damages in the action exceeds $100,000.00." The statute requires the paying party to

[3] The total fault assessed to released persons equal 62 percent, leaving only 38 percent of the fault apportioned among present defendants.

[4] Section 538.210.4 permits the court to adjust the cap for inflation. At the time of this trial, the cap had risen from $350,000 to $430,000.

post sufficient security to assure payment of the judgment.

Section 538.230.2 modifies joint and several liability. "[A]ny defendant against whom an award of damages are made shall be jointly liable only with those defendants whose apportioned percentage of fault is equal to or less than such defendant."

B.

A statute is presumed to be constitutional and will not be held to be unconstitutional unless it clearly and undoubtedly contravenes the constitution. A statute will be enforced by the courts unless it plainly and palpably affronts fundamental law embodied in the constitution. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 828 (Mo. banc 1991), *citing Winston v. Reorganized School Districts R-2, Lawrence County*, 636 S.W.2d 324, 327 (Mo. banc 1982). When the constitutionality of a statute is attacked, the burden of proof is upon the party claiming that the statute is unconstitutional. *Blaske*, 821 S.W.2d at 828-29, *citing Schnorbus v. Director of Revenue*, 790 S.W.2d 241, 243 (Mo. banc 1990).

C.

Equal Protection

The Adamses claim that the challenged provisions of Chapter 538 deny them equal protection of the laws as required by the Fourteenth Amendment of the United States Constitution and article I, section 2, of the Missouri Constitution.

Equal protection analysis requires the court to determine initially whether the classification burdens a "suspect class" or impinges upon a "fundamental right." If it does neither, the statute will survive an equal protection challenge if its classifications are rationally related to a legitimate state interest. *Mahoney v. Doerhoff Surgi-*

cal Services, 807 S.W.2d at 503, 512 (Mo. banc 1991); *Blaske*, 821 S.W.2d at 829. "Fundamental rights" include, but are not limited to, freedom of speech, freedom of the press, freedom of religion, the right to vote, the right to personal privacy and other basic liberties. *Mahoney*, 807 S.W.2d at 512; *Blaske*, 821 S.W.2d at 829; *State Board of Registration v. Giffen*, 651 S.W.2d 475, 479-80 (Mo. banc 1983). A "suspect" classification "is one which is inherently suspect in a constitutional sense. These are classes such as those based upon race, national origin or illegitimacy, which, because of historical reasons, need special protection from a political process controlled by the majority." *Blaske*, 821 S.W.2d at 829, *citing Mahoney*, 807 S.W.2d at 512.

The Adamses claim that the right to a trial by jury, the right to open courts and the right to a certain remedy are "fundamental rights" and that victims of medical malpractice are a "suspect class." The latter assertion is without support in either law or reason. We reject the notion that victims of medical malpractice are a suspect class. *Mahoney*, 807 S.W.2d at 512.

Even were we to accept the Adamses' argument that rights to trial by jury, open courts and certain remedies are fundamental rights for the sake of argument, as the discussions at II, D and E, *infra*, show, those rights are not violated by the challenged provisions of Chapter 538.

Because neither a denial of a fundamental right nor a suspect class is present in this case, the challenged statutory provisions will be upheld if rationally related to a legitimate state interest. *Mahoney*, 807 S.W.2d at 512. Rational basis review is minimal in nature. *Schnorbus*, 790 S.W.2d at 243. A statutory classification will be upheld if "any state of facts reasonably may be conceived to justify it." *Mahoney*, 807 S.W.2d at 512. Under a rational basis review, a court will strike down the challenged legislation "only if the classification rests on grounds wholly irrelevant to the achievement of the

state's objective." *Id.* Furthermore, as we have repeatedly said, "It is not [the Court's] province to question the wisdom, social desirability or economic policy underlying a statute as these are matters for the legislature's determination." *Blaske*, 821 S.W.2d at 829, *quoting Winston*, 636 S.W.2d at 327. "The fact that we think the legislature's choices socially undesirable, unwise, or even unfair is of little consequence to our decision . . . if the legislature's classification advances the legislature's legitimate policy." *Findley v. City of Kansas City*, 782 S.W.2d 393, 396 (Mo. banc 1990).

Under Section 538.205 a "Health care provider" is:

> [A]ny physician, hospital, ambulatory surgical center, long-term care facility, dentist, registered or licensed practical nurse, optometrist, podiatrist, pharmacist, chiropractor, professional physical therapist, psychologist, physician-in-training, and any other person or entity that provides health care services under the authority of a license or certificate.

The statute purposely treats this restrictive class much differently than any other kind of tortfeasor who might be involved in a negligence lawsuit. Section 538.210 places a liability cap on noneconomic damages in any action against a health care provider that arises out of the rendering of health care services. Section 538.220 allows future damages to be paid in periodic or installment payments if the total award exceeds $100,000. Section 538.230 alters traditional joint and several liability and provides for apportioned fault to include a percentage allocated for parties who have been releaesd from liability.

The exact purpose of this classification is somewhat uncertain. Amici supporting the legislation tell us that the provisions of Chapter 538 were enacted in 1986 in an effort to address a perceived malpractice insurance crisis in the health care industry which in turn threatened the availability and affordability of health care services.

According to Amicus Briefs in support of the health care respondents, the legislature had before it information that the number of malpractice claims in Missouri increased 249 percent between 1981 and 1986; that aggregate and individual damage awards had accelerated to the extent that the state risked losing insurers; and that many physicians were believed to be considering leaving high risk areas of practice, potentially leaving many Missourians, particularly those in rural areas, without adequate medical protection. Thus, we are told that the primary goal of the General Assembly in passing Chapter 538 was to confront a medical malpractice insurance crisis that threatened adversely to affect primary health care in Missouri. Accordingly, the statute represents an effort by the legislature to reduce rising medical malpractice premiums and in turn prevent physicians and others from discontinuing "high risk" practices and procedures.

Both sides offer an array of evidence that both supports and refutes the existence of a "crisis" in medical malpractice premiums—enough evidence, in fact, that at the very least, it is a debatable proposition that such a crisis does in fact exist. Under equal protection rational review, this doubt must be resolved in favor of the General Assembly. While some clearly disagree with its conclusions, it is the province of the legislature to determine socially and economically desirable policy and to determine whether a medical malpractice crisis exists. Here, the preservation of public health and the maintenance of generally affordable health care costs are reasonably conceived legislative objectives that can be achieved, if only inefficiently, by the statutory provision under attack here.

The legislature could rationally believe that the cap on non-economic damages would work to reduce in the aggregate the amount of damage awards for medical malpractice and, thereby, reduce malpractice insurance premiums paid by health care providers. Were this to result, the legislature could reason, physicians would be

willing to continue "high risk" medical practices in Missouri and provide quality medical services at a less expensive level than would otherwise be the case.

The noneconomic damage cap does not take away from any economic or punitive damage award. Moreover, the limit on noneconomic damages still allows $430,000 per liable defendant in this case, in addition to the nearly $5.9 million awarded in economic damages. As such, the limitation on noneconomic damages is a rational response to the legitimate legislative purpose of maintaining the integrity of health care for all Missourians.

Similarly, Section 538.220 is rationally related to the general goal of preserving adequate, affordable health care for all Missourians. It permits defendants to satisfy a judgment for future damages in periodic or installment payments. By permitting installment payments, the legislature could reason that spreading future judgment payments over a period of time would reduce costs to insurance companies and reduce insurance premiums, lowering insurance premiums and making medical services less expensive and more available than would otherwise be the case.

Section 538.230.1 requires the finder of fact to apportion fault among all parties, including those who have been released from liability. Section 538.230.2 alters common law joint and several liability. "[A]ny defendant against whom an award of damages is made shall be jointly liable only with those defendants whose apportioned percentage of fault is equal to or less than such defendant." This alteration of joint and several liability limits the potential financial exposure of a health care defendant to the amount of that defendant's own responsibility for the plaintiff's injury. By so doing, the legislature could have reasoned that limiting the exposure of any individual defendant would reduce any individual insurance carrier's financial responsibility for a plaintiff's

injuries caused by multiple tortfeasors (as is generally the case in medical malpractice actions), and serve to reduce or limit malpractice insurance premiums with the results previously discussed.

We hold that the provisions of Chapter 538 do not violate equal protection.

D.

Open Courts

Article I, section 14, provides:

> [t]hat the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay.

Appellants claim that Chapter 538 violates the "open courts" and "certain remedy" provisions of Missouri Constitution by permitting the legislature to intrude impermissibly upon the judicial process.

This Court has distinguished between statutes that imposed procedural bars to access, and statutes that change the common law by the elimination (or limitation of) a cause of action. *Cf. State ex rel. Cardinal Glennon Memorial Hospital v. Gaertner*, 583 S.W.2d 107 (Mo. banc 1979), with *Blaske*, 821 S.W.2d 822 (Mo. banc 1991). The former are impermissible; the latter are a valid exercise of a legislative prerogative.

In *Blaske*, for example, this Court upheld a statute of repose that eliminated a cause of action for personal injury or wrongful death against designers and builders ten years following completion of construction. We held that the statute in *Blaske* did not violate article I, section 14, because that staute did not bar access to the courts to persons who had a valid cause of action; it simply modified the common law so that after ten years, the cause of action could be pursued. Similarly, in *Harrell v.*

Total Health Care, Inc., 781 S.W.2d 58, 59-61 (Mo. banc 1989), this Court upheld a legislative elimination of all causes of action for medical malpractice against health service corporations as a valid exercise of legislative discretion to change the substantive common law.

In contrast, this Court in *Cardinal Glennon* determined that a pretrial procedure that required a malpractice plaintiff to submit his or her claim to the Professional Liability Review Board before filing a cause of action contained an impermissible precondition on the plaintiff's right to access the courts.[5]

Here, Chapter 538 modifies the common law; it does not erect a condition precedent or any other procedural barrier to access to the courts. Nor does Chapter 538 deny plaintiffs a lawful remedy for a wrong done; it simply redefines the substantive law by limiting the amount of noneconomic damages plaintiffs can recover. In sum, the constitutional right of access assures Missourians of the "right to pursue in the courts the causes of action the substantive law recognizes." *Mahoney*, 807 S.W.2d at 510; *Findley*, 782 S.W.2d at 396. It does not assure that a substantive cause of action once recognized in the common law will remain immune from legislative or judicial limitation or elimination.

The Adamses nonetheless suggest that the General Assembly must establish a reasonable substitute before abolishing or restricting a common law cause of action. They argue that without this *quid pro quo*, the statute arbitrarily denies full compensation to an injured plaintiff. They rely on *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988), and *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987), as support for this proposition.

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[5] This Court in *Mahoney* distinguished *Cardinal Glennon* by noting that Section 538.225, unlike the statute under scrutiny in *Cardinal Glennon*, "does not operate until after the petition is filed and the incidents of jurisdiction to adjudicate are met." *Mahoney*, 807 S.W.2d at 509.

In *Lucas*, the Texas Supreme Court, on a certified question from the Fifth Circuit, found a Texas statute limiting total damages against a physician or health care provider to $500,000 and noneconomic damages to $150,000 unconstitutional. That court applied the open courts clause of the Texas Constitution to invalidate this total damage limitation by stating:

> We hold that the restriction is unreasonable and arbitrary and that [the statutory provisions] unconstitutionally limit Lucas's right to access to the courts . . . . the legislature has failed to provide Lucas any *adequate substitute* to obtain redress for his injuries.

[Emphasis added.] *Lucas*, 757 S.W.2d at 690.

The Supreme Court of Florida in similar fashion had earlier held that a $450,000 ceiling on noneconomic damages on all tort and contract cases violated the open courts provision of the Florida constitution. The Court first compared the Tort Reform Act with other constitutionally sound statutes that placed similar restrictions on plaintiffs' right to recover (e.g., no-fault insurance and sovereign immunity), and then held the statutory restrictions impermissible unless the legislature: (1) provided a reasonable alternative remedy or commensurate benefit or (2) showed an overpowering public necessity for the abolishment of the right and no alternative method of meeting such public necessity. *Smith*, 507 So.2d at 1088.

Missouri courts have never interpreted article I, section 14 of our constitution to mean more than its original, textually implicit purpose to assure Missourians of procedural due process. Thus, the "reasonable substitute" holdings of Texas and Florida are an interesting judicial gloss on the constitution. We reject the Texas and Florida interpretations. They arbitrarily and unnecessarily limit the legitimate lawmaking role of the legislative branch in a manner not intended by our constitution. Even

arcane causes of action would be difficult for the legislature to eliminate under a *quid pro quo* requirement. Moreover, the Texas-Florida interpretation views the common law as an inviolate body of law, rather than as a starting point from which judicial declarations are subject to modification by legislative policy choices and subsequent judcial decisions necessary to meet the needs of a changing society. *Yerger v. Smith*, 89 S.W.2d 66, 74, 338 Mo. 140 (1935); *O'Dell v. School District of Independence*, 521 S.W.2d 403, 405 (Mo. banc 1975). Furthermore, by statute and decision, the common law is in force in Missouri only to the extent that it has not been subsequently changed by the legislature or judicial decision. Section 1.010; *Cook v. Cook*, 124 S.W.2d 675, 232 Mo. App. 994 (1939).

The reasoning of the Texas and Florida decisions seem to apply equally to legislatively adopted causes of action. We doubt the wisdom of a rule of law that limits the legislature's ability to respond statutorily to changing societal concerns or correct previous policy positions upon receipt of better information.

The challenged portions of Chapter 538 do not violate article I, section 14.

E.

Trial by Jury

The Adamses' related argument is that the limitation on noneconomic damages denies plaintiffs their constitutional right to trial by jury. Article I, section 22(a) of the Missouri Constitution, provides in pertinent part:

> That the right of trial by jury as heretofore enjoyed shall remain inviolate . . . .

Appellants argue that this right includes the right to have the jury determine all damages without interference by the legislature.

The constitutional guarantee of the right to a jury trial has remained the same through four Missouri constitutions commencing with the Constitution of 1820. Thus, the right to jury trial protected by the present constitution is that which existed at common law before the adoption of the first constitution. *Goodrum v. Asplundh Tree Expert Company*, 824 S.W.2d 6, 11 (Mo. banc 1992), *quoting Miller v. Russell*, 593 S.W.2d 598, 605 (Mo. App. 1979).

A jury's primary function is fact-finding. This includes a determination of a plaintiff's damages. *Jaycox v. Brune*, 434 S.W.2d 539, 542-43 (Mo. 1968). Here, the jury assessed liability and then determined damages, both economic and noneconomic. With that the jury completed its constitutional task.

The court applies the law to the facts. Section 538.210 establishes the substantive, legal limits of the plaintiffs' damage remedy. In this sense, the permissible remedy is a matter of law, not fact, and not within the purview of the jury. Because Section 538.210 is not applied until after the jury has completed its constitutional task, it does not infringe upon the right to a jury trial. *Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525 (Va. 1989). *See also Tull v. United States*, 481 U.S. 412 (1987) (Interpreting the Clean Water Act). There is no substantive right under the common law to a jury determination of damages under the Seventh Amendment. The assessment of a civil penalty is not one of the "fundamental elements" preserved by the common law right to a jury trial); and *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88-89 (1978) (The common law never recognized a right to a full recovery in tort.)

In sum, the legislature has the right to abrogate a cause of action cognizable under common law completely. *DeMay v. Liberty Foundry Co.*, 37 S.W.2d 640, 649

(Mo. 1931); *accord Harrell, Mahoney, Goodrum, supra.* If the legislature has the constitutional power to create and abolish causes of action, the legislature also has the power to limit recovery in those causes of action. The point is denied.

F.

Due Process

Appellants claim that the challenged portions of Chapter 538 violate the Due Process clause of article I, section 10 of the Missouri Constitution, which reads in pertinent part:

> That no person shall be deprived of life, liberty or property without due process of law.

The analysis required for this issue is the same as appellants' Open Courts claim under article I, section 14. (II, D, *supra*). Both clauses of the Missouri Constitution guarantee "no more than that a claimant is entitled to whatever process is constitutionally mandated or permitted under the laws extant at the time of claim." *Goodrum*, slip op. at 8, *quoting Findley*, 782 S.W.2d at 397-98. Here, the plaintiffs received all the process due them under law. We hold that the challenged portions of Chapter 538 do not violate due process.

G.

The Adamses also raise an equal protection challenge to Section 538.300, RSMo 1989. That statute does not permit prejudgment interest on judgments against health care providers. The Adamses also claim that the challenged provisions of Chapter 538 violate: (1) the requirement of one subject (art. III, § 23); (2) the privileges and immunities clause (art. 1, § 13); (3) the constitutional directives for amending statutes (art. III, § 28); (4) the prohibition against special laws (art. III, § 40 (28)); and (5) separation of powers (art. II, § 1).

The Adamses failed to preserve these constitutional challenges for appellate review. They were not raised at the earliest opportunity, but only after the trial court entered its judgment in post-trial motions.

In *Land Clearance for Redevelopment v. Kansas City*, 805 S.W.2d 173 (Mo. banc 1991), the appellant first raised the unconstitutionality of the statutory interest rate in a motion to amend the judgment. Appellants argued that the constitutional questions presented themselves only after judgment was entered on the verdict and could not have been known in advance. This Court held that the constitutional claim was waived when it was not raised at the earliest opportunity. We noted that the appellant could not have been surprised by the trial court's utilization of the statutory interest rate and that this issue could easily have been asserted before judgment. We reasoned that failure to raise the constitutional issue at an earlier stage denied party opponents an opportunity to offer an evidentiary response and denied the trial court a full opportunity to identify and rule on the issue. *Land Clearance*, 805 S.W.2d at 175-76. Moreover, "[a]n attack on the constitutionality of a statute is of such dignity and importance that the record touching such issues should be fully developed and not raised as an afterthought in a post-trial motion or on appeal." *Id.* at 176.

In similar fashion, the Adamses first raised the constitutional challenge to the prejudgment interest statute and the remaining constitutional issues in a post-trial motion to modify judgment.[6] As did the appellants in *Land Clearance*, the Adamses also assert that these matters were not "justiciable" until after trial. *Land Clearance* rejects the Adamses' argument as to prejudgment interest. It is denied here as well. As to the remaining constitutional issues, there is nothing pecular to these

[6] The "separation of powers" argument, however, apparently was first raised in appellants' brief to this Court.

constitutional provisions that would require a specific verdict before a challenge could be made. For the reasons expressed in *Land Clearance*, the remaining constitutional points are also denied.

III.

The Adamses' constitutional challenges are denied. The cause is transferred to the court of appeals.

Covington, Holstein, Benton, Thomas, JJ., and Blackmar, Sr.J., concur; Rendlen, Sr.J. dissents. Price, J., not sitting because not a member of the Court when case was submitted.

APPENDIX B

VERDICT A

NOTE: Complete this form by writing in the names required by your verdict.

On the claim of Plaintiff Nicole Adams for personal injuries and damages against defendant The Children's Mercy Hospital, we, the undersigned jurors, find in favor of:

NICOLE ADAMS

(Plaintiff Nicole Adams)

or

(Defendant The Children's Mercy Hospital)

On the claim of Plaintiff Nicole Adams for personal injuries and damages against defendant Suzanna Roushar, R.N., we, the undersigned jurors, find in favor of:

(Plaintiff Nicole Adams)

or

SUZANNA ROUSHAR

(Defendant Suzanna Roushar, R.N.)

On the claim of Plaintiff Nicole Adams for personal injuries and damages against defendant Cynthia Dooley, R.N., we, the undersigned jurors, find in favor of:

(Plaintiff Nicole Adams)

or

CYNTHIA DOOLEY

(Defendant Cynthia Dooley, R.N.)

On the claim of Plaintiff Nicole Adams for personal injuries and damages against defendant Jane Jelinek-

Boozalis, M.D., we, the undersigned jurors, find in favor of:

NICOLE ADAMS

(Plaintiff Nicole Adams)

or

_____

(Defendant Jane Jelinek-Boozalis, M.D.)

NOTE: Complete the following only if one or more of the above findings is in favor of Plaintiff Nicole Adams.

Complete by writing in the amount of damages, if any, for each of the following itemized categories. If you do not find that Plaintiff has damages in a particular category, write "none" in that category. The total damages must equal the total of the itemized damage amounts you have assessed.

We, the undersigned jurors, assess the damages of Plaintiff Nicole Adams as follows:

For past economic damages, including past medical damages,	$ 141,379.00
For future economic damages, excluding future medical damages,	$ 760,042.00
For future medical damages,	$ 4,947,311.00
For past non-economic damages,	$ 3,905,000.00
For future non-economic damages,	$10,000,000.00
TOTAL DAMAGES—	$19,750,732.00

NOTE: Complete the following paragraph by writing in the words required by your verdict.

On the claim of Julia Alice Adams for damages due to injury to her child Nicole Adams, we, the undersigned jurors find that Plaintiff Julia Alice Adams DID ("did" or "did not") sustain damages as a direct result of injury to her child Nicole Adams.

NOTE: Complete the following paragraph only if the above-finding is that Julia Alice Adams "did" sustain such damage.

We, the undersigned jurors, assess the damages of Plaintiff Julia Alice Adams as follows:

For past non-economic damages,	$250,000.00
For future non-economic damages,	$ —0—
TOTAL DAMAGES—	$250,000.00

NOTE: All jurors who agree to the above must sign below:

/s/ Terrie E. Williams

/s/ Carrie E. Whitney

/s/ Tammy Schupp

/s/ Linda Schwark

/s/ Rosemary Groves

/s/ Ellen Sears

/s/ Thomas E. Robb

/s/ Terry J. McCarty

/s/ Donald E. Barza

/s/ Dixie G. Clark

APPENDIX C

IN THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

Case No. CV89-23626

Civil Docket "M"

NICOLE ADAMS, A Minor Child, by and through her Legal Guardian and Next Friend, JULIA ALICE ADAMS,
Plaintiffs,

v.

THE CHILDREN'S MERCY HOSPITAL, *et al.*,
Defendants.

JUDGMENT

NOW ON THIS 14th day of March, 1991, pursuant to the verdict of the jury rendered in this cause on February 28, 1991,

IT IS HEREBY ORDERED AND ADJUDGED by the Court that plaintiff Nicole Adams, a minor, by and through her next friend and legal guardian Julia Adams, recover from defendants The Children's Mercy Hospital and Jane Jelinek-Boozalis, M.D., damages in the following amounts:

VERDICT FOR NICOLE ADAMS:	
Total Economic Damages	$ 5,848,732.00
Less medical bills paid by Children's Mercy Hospital	$ 28,232.25
Less medical bills absorbed by Children's Mercy Hospital	$ 114,184.52

Net Economic Damages	$ 5,706,315.30
Total Non-Economic Damages	$13,905,000.00
Applying Cap Pursuant to § 538.210	$ 430,000.00

Section 538.230 RSMo., provides that plaintiff's claim is to be reduced by the amount of released persons' equitable share of the total obligation pursuant to full apportionment of fault as though there had been no release. The total fault assessed to released persons equals 62%, leaving only 38% of the fault apportioned among defendants in the case. Of that amount, 20% was apportioned to defendant Children's Mercy Hospital and 18% was apportioned to defendant Jane Jelinek-Boozalis, M.D.

Accordingly, plaintiff Nicole Adams' net damages are as follows:

TOTAL ECONOMIC DAMAGES:	
($5,848,732.00 × .38)	$ 2,222,518.16
TOTAL NON-ECONOMIC DAMAGES:	
($430,000.00 × 2 "defendants")	$860,000.00
TOTAL JUDGMENT FOR NICOLE (not including Court costs):	$3,082,518.16

Of that amount, the breakdown of damages is as follows:

Against Children's Mercy Hospital:	
Economic Damages:	
($5,848,732.00 × .20)	$1,169,746.40
Non-Economic Damages:	$430,000.00
Children's Mercy Hospital's Total Share:	$1,599,746.40
Less credit for medical bills to CMH	$142,416.57
Children's Mercy net share	$1,485,561.88

Against Defendant Jane Jelinek-Boozalis, M.D.:	
Total Economic Damages:	
($5,848,732 × .18)	$1,052,771.76
Total Non-Economic Damages:	$430,000.00
Defendant Jelinek's total share:	$1,482,771.76

IT IS FURTHER ORDERED AND ADJUDGED by the Court that plaintiff Julia Adams recover from the defendants Children's Mercy Hospital and Jane Jelinek-Boozalis, M.D., the following sums:

Past Economic Damages	
($250,000 × .38)	$95,000.00
Against Defendant Children's Mercy Hospital:	
($250,000.00 × .20)	$50,000.00
Against Defendant Jelinek-Boozalis, M.D.:	
($250,000 × .18)	$45,000.00
Total	$95,000.00

Pursuant to § 538.230(2), defendant Children's Mercy Hospital is jointly and severally liable for the entire amount of $3,082,518.16 to Nicole Adams (less the credit to Children's Mercy Hospital for medical bills), and $95,000.00 to Julia Adams.

Plaintiffs' herein recover nothing from defendants Cynthia Dooley, R.N., and Suzanna Roushar, R.N.

In addition to the above, plaintiffs shall have and recover of and from said defendants the costs of this action.

/s/ John R. O'Malley
THE HONORABLE JOHN R. O'MALLEY
Judge of the Circuit Court

APPENDIX D

IN THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

Case No. CV89-23626
Division Six
Civil Docket "M"

NICOLE ADAMS, A Minor Child, by and through her Legal Guardian and Next Friend, JULIA ALICE ADAMS,
Plaintiffs,

vs.

THE CHILDREN'S MERCY HOSPITAL, *et al.*,

ORDER

NOW ON THE 12TH DAY of April 1991, the above cause comes before the Court on Plaintiff's Motion to Modify Judgment of Trial Court, or Alternatively, Motion for New Trial, filed the 15th day of March, 1991, Defendant Children's Mercy Hospital's Motion for Judgment Nothwithstanding the Verdict or, in the Alternative, for a New Trial filed the 15th day of March, 1991; and Defendant, Childrens Mercy Hospital's, and Defendant, Jane Jelenick-Boozalis, MD's Request for Periodic or Installment Payment of Future Damages.

The Court having read the pleadings and heard the arguments of the parties, and being fully advised in the premise, enters the following orders:

(1) Plaintiff's Motion to Modify Judgment of Trial Court or, Alternatively, Motion for New Trial is hereby OVERRULED.

(2) Defendant, Childrens Mercy Hospital's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial is hereby OVERRULED.

(3) Defendant, Childrens Mercy Hospital's Request for Periodic or Installment Payment of Future Damages is hereby SUSTAINED. Therefore, payment is ordered as follows:

1. One payment per year in the amount of $300,000.00 for four years.

2. One payment in the fifth year of $285,561.88.

(4) Defendant, Jane Jelenek-Boozalis, M.D.'s Request for Periodic or Installment Payment of Future Damages is hereby SUSTAINED. Therefore, payment is ordered as follows:

1. One payment per year in the amount of $300,000.00 for four years.

2. One payment in the fifth year of $282,771.76.

IT IS SO ORDERED.

Date: May 17, 1991

/s/ John R. O'Malley
JOHN R. O'MALLEY
Judge

APPENDIX E

STATUTORY PROVISIONS

MO. REV. STAT., Chapter 538 (1986)

(TORT ACTIONS BASED ON IMPROPER HEALTH CARE)

538.205. Definitions

As used in sections 538.205 to 538.230, the following terms shall mean:

(1) "*Economic damages*", damages arising from pecuniary harm including, without limitation, medical damages, and those damages arising from lost wages and lost earning capacity;

(2) "*Equitable share*", the share of a person or entity in an obligation that is the same percentage of the total obligation as the person's or entity's allocated share of the total fault, as found by the trier of fact;

(3) "*Future damages*", damages that the trier of fact finds will accrue after the damages findings are made;

(4) "*Health care provider*", any physician, hospital, ambulatory surgical center, long-term care facility, dentist, registered or licensed practical nurse, optometrist, podiatrist, pharmacist, chiropractor, professional physical therapist, psychologist, physician-in-training, and any other person or entity that provides health care services under the authority of a license or certificate;

(5) "*Health care services*", any services that a health care provider renders to a patient in the ordinary course of the health care provider's profession or, if the health care provider is an institution, in the ordinary course of furthering the purposes for which the institution is organized. Professional services shall include, but are not limited to, transfer to a patient of goods or services incidental or pursuant to the practice of the health care pro-

vider's profession or in furtherance of the purposes for which an institutional health care provider is organized;

(6) *"Medical damages"*, damages arising from reasonable expenses for necessary drugs, therapy, and medical, surgical, nursing, x-ray, dental, custodial and other health and rehabilitative services;

(7) *"Noneconomic damages"*, damages arising from nonpecuniary harm including, without limitation, pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, loss of capacity to enjoy life, and loss of consortium but shall not include punitive damages;

(8) *"Past damages"*, damages that have accrued when the damages findings are made;

(9) *"Physician employee"*, any person or entity who works for hospitals for a salary or under contract and who is covered by a policy of insurance or self-insurance by a hospital for acts performed at the direction or under control of the hospital;

(10) *"Punitive damages"*, damages intended to punish or deter willful, wanton or malicious misconduct;

(11) *"Self-insurance"*, a formal or informal plan of self-insurance or no insurance of any kind.

538.210. Limitation on noneconomic damages—jury not to be informed of limit—limit, how set annually, publication—defendant defined—punitive damages, requirements

1. In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, no plaintiff shall recover more than three hundred fifty thousand dollars per occurrence for noneconomic damages from any one defendant as defendant is defined in subsection 2 of this section.

2. *"Defendant"* for purposes of sections 538.205 to 538.230 shall be defined as:

(1) A hospital as defined in chapter 197, RSMo, and its employees and physician employees who are insured under the hospital's professional liability insurance policy or the hospital's self-insurance maintained for professional liability purposes;

(2) A physician, including his nonphysician employees who are insured under the physician's professional liability insurance or under the physician's self-insurance maintained for professional liability purposes;

(3) Any other health care provider having the legal capacity to sue and be sued and who is not included in subdivisions (1) and (2) of this subsection, including employees of any health care providers who are insured under the health care provider's professional liability insurance policy or self-insurance maintained for professional liability purposes.

3. In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, where the trier of fact is a jury, such jury shall not be instructed by the court with respect to the limitation on an award of noneconomic damages, nor shall counsel for any party or any person providing testimony during such proceeding in any way inform the jury or potential jurors of such limitation.

4. The limitation on awards for noneconomic damages provided for in this section shall be increased or decreased on an annual basis effective January first of each year in accordance with the Implicit Price Deflator for Personal Consumption Expenditures as published by the Bureau of Economic Analysis of the United States Department of Commerce. The current value of the limitation shall be calculated by the director of the division of insurance, who shall furnish that value to the secretary of state, who shall publish such value in the Missouri Register as soon after each January first as practicable, but it shall

otherwise be exempt from the provisions of section 536.021, RSMo.

5. Any provision of law or court rule to the contrary notwithstanding, an award of punitive damages against a health care provider governed by the provisions of sections 538.205 to 538.230 shall be made only upon a showing by a plaintiff that the health care provider demonstrated willful, wanton or malicious misconduct with respect to his actions which are found to have injured or caused or contributed to cause the damages claimed in the petition.

538.215. Damage itemization by trier of fact—excess noneconomic damages to be reduced by court

1. In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, any damages found shall be itemized by the trier of fact as follows:

(1) Past economic damages;

(2) Past noneconomic damages;

(3) Future medical damages;

(4) Future economic damages, including future medical damages; and

(5) Future noneconomic damages.

2. All future damages which are itemized as required by subsection 1 of this section shall be expressed by the trier of fact at present value.

3. Any award of noneconomic damages in excess of the limit provided herein shall be reduced by the court to the maximum amount.

538.220. Damages, how paid—security required for future damage payments, when—attorney's fees—death of judgment creditor, effect

1. In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, past damages shall be payable in a lump sum.

2. At the request of any party to such action made prior to the entry of judgment, the court shall include in the judgment a requirement that future damages be paid in whole or in part in periodic or installment payments if the total award of damages in the action exceeds one hundred thousand dollars. Any judgment ordering such periodic or installment payments shall specify the recipient, the amount of each payment, the interval between payments, and the number of payments. The parties shall be afforded the opportunity to agree on the manner of payment of future damages, including the rate of interest, if any, to be applied, subject to court approval. However, in the event the parties cannot agree, the unresolved issues shall be submitted to the court for resolution, either with or without a post-trial evidentiary hearing which may be called at the request of any party or the court. If a defendant makes the request for payment pursuant to this section, such request shall be binding only as to such defendant and shall not apply to or bind any other defendant.

3. As a condition to authorizing periodic payments of future damages, the court may require a judgment debtor who is not adequately insured to post security or purchase an annuity adequate to assure full payment of such damages awarded by the judgment. Upon termination of periodic payments of future damages, the court shall order the return of this security or so much as remains to the judgment debtor.

4. If a plaintiff and his attorney have agreed that attorney's fees shall be paid from the award, as part of a

contingent fee arrangement, it shall be presumed that the fee will be paid at the time the judgment becomes final. If the attorney elects to receive part or all of such fees in periodic or installment payments from future damages, the method of payment and all incidents thereto shall be a matter between such attorney and the plaintiff and not subject to the terms of the payment of future damages, whether agreed to by the parties or determined by the court.

5. Upon the death of a judgment creditor, the right to receive payments of future damages, other than future medical damages, being paid by installments or periodic payments will pass in accordance with the Missouri probate code unless otherwise transferred or alienated prior to death. Payment of future medical damages will continue to the estate of the judgment creditor only for as long as necessary to enable the estate to satisfy medical expenses of the judgment creditor that were due and owing at the time of death, which resulted directly from the injury for which damages were awarded, and do not exceed the dollar amount of the total of payments for such future medical damages outstanding at the time of death.

538.225. Affidavit by a health care provider certifying merit of case—content filed, when—failure to file, effect

1. In any action against a health care provider for damages for personal injury or death on account of the rendering of or failure to render health care services, the plaintiff or his attorney shall file an affidavit with the court stating that he has obtained the written opinion of a legally qualified health care provider which states that the defendant health care provider failed to use such care as a reasonably prudent and careful health care provider would have under similar circumstances and that such failure to use such reasonable care directly caused or directly contributed to cause the damages claimed in the petition.

2. The affidavit shall state the qualifications of such health care providers to offer such opinion.

3. A separate affidavit shall be filed for each defendant named in the petition.

4. Such affidavit shall be filed no later than ninety days after the filing of the petition unless the court, for good cause shown, orders that such time be extended.

5. If the plaintiff or his attorney fails to file such affidavit the court may, upon motion of any party, dismiss the action against such moving party without prejudice.

538.230. Apportionment of fault authorized—defendants jointly and severally liable, when—release of one defendant, effect

1. In any action against a health care provider for damages for personal injury or death on account of the rendering of or failure to render health care services where fault is apportioned among the parties and persons released pursuant to subsection 3 of this section, the court, unless otherwise agreed by all the parties, shall instruct the jury to apportion fault among such persons and parties, or the court, if there is no jury, shall make findings, indicating the percentage of total fault of all the parties to each claim that is allocated to each party and person who has been released from liability under subsection 3 of this section.

2. The court shall determine the award of damages to each plaintiff in accordance with the findings, subject to any reduction under subsection 3 of this section and enter judgment against each party liable on the basis of the rules of joint and several liability. However, notwithstanding the provisions of this subsection, any defendant against whom an award of damages is made shall be jointly liable only with those defendants whose appor-

tioned percentage of fault is equal to or less than such defendant.

3. Any release, covenant not to sue, or similar agreement entered into by a claimant and a person or entity against which a claim is asserted arising out of the alleged transaction which is the basis for plaintiff's cause of action, whether actually made a party to the action or not, discharges that person or entity from all liability for contribution or indemnity but it does not discharge other persons or entities liable upon such claim unless it so provides. However, the claim of the releasing person against other persons or entities is reduced by the amount of the released persons' or entities' equitable share of the total obligation imposed by the court pursuant to a full apportionment of fault under this section as though there had been no release.

538.235. Laws applicable to what actions

The provisions of sections 538.205 to 538.230 shall apply only to causes of actions arising on or after February 3, 1986.

538.300. Certain laws not applicable to sections 538.205 to 538.230

The provisions of sections 260.552, RSMo, 408.040, RSMo, 490.715, RSMo, 509.050, RSMo, 510.263, RSMo, 537.067, 537.068, 537.117, 537.675, and 537.760 to 537.765, RSMo, shall not apply to actions under sections 538.205 to 538.230.